No. 16-142
Title: Terry Michael Honeycutt, Petitioner
v.
United States
Docketed: August 1, 2016
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (14-5790, 14-5850)
Decision Date: March 4, 2016
Rehearing Denied: May 31, 2016

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~~~~~
Jul 29 2016	Petition for a writ of certiorari filed. (Response due August 31, 2016)
Aug 24 2016	Order extending time to file response to petition to and including September 30, 2016.
Sep 19 2016	Order further extending time to file response to petition to and including October 31, 2016.
Oct 31 2016	Brief of respondent United States in opposition filed.
Nov 14 2016	Reply of petitioner Terry Michael Honeycutt filed.
Nov 15 2016	DISTRIBUTED for Conference of December 2, 2016.
Dec 5 2016	DISTRIBUTED for Conference of December 9, 2016.
Dec 9 2016	Petition GRANTED.
Dec 22 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Dec 30 2016	Motion to dispense with printing the joint appendix filed by petitioner Terry Michael Honeycutt.
Jan 9 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jan 23 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 23 2017	Brief of petitioner Terry Michael Honeycutt filed.
Jan 30 2017	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Feb 3 2017	SET FOR ARGUMENT on Wednesday, March 29, 2017
Feb 6 2017	Record requested from the U.S.C.A. 6th Circuit.
Feb 7 2017	Record received from the U.S.C.A. 6th Circuit. The record is electronic and available on PACER. One restricted document also received.
Feb 22 2017	CIRCULATED.
Feb 22 2017	Brief of respondent United States filed. (Distributed)
Mar 20 2017	Reply of petitioner Terry Michael Honeycutt filed. (Distributed)
Mar 29 2017	Argued. For petitioner: Adam G. Unikowsky, Washington, D. C. For respondent: Brian H. Fletcher, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jun 5 2017	Judgment REVERSED. Sotomayor, J., delivered the opinion of the Court, in which all other Members joined, except Gorsuch, J., who took no part in the consideration or decision of the case.
Jul 7 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

16-142

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No. _____

IN THE
Supreme Court of the United States

TERRY M. HONEYCUTT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 21 U.S.C. § 853(a)(1), a person convicted of violating a federal drug law must forfeit to the government "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation."

The question presented is:

Does 21 U.S.C. § 853(a)(1) mandate joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy?

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PETITION FOR WRIT OF CERTIORARI

Terry M. Honeycutt petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Sixth Circuit (Pet. App. 1a-34a) is reported at 816 F.3d 362 (6th Cir. 2016). The District Court's oral determination on forfeiture (Pet. App. 35a-46a) is unreported. The Sixth Circuit's order denying the petition for rehearing en banc (Pet. App. 47a-48a) is unreported.

JURISDICTION

The judgment of the Sixth Circuit was entered on March 4, 2016. A timely petition for rehearing en banc was denied on May 31, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 303, 98 Stat. 2040, 2044, are codified at 21 U.S.C. § 853. 21 U.S.C. § 853(a)(1) provides:

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.

INTRODUCTION

Under 21 U.S.C. § 853(a)(1), any person convicted of a federal drug crime must forfeit "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." This case concerns the application of § 853(a)(1) to individuals convicted of participating in a drug conspiracy who did not personally receive proceeds of that conspiracy. The question presented is whether all members of the conspiracy are jointly and severally liable for forfeiture of all of the reasonably foreseeable proceeds of the conspiracy, even if they did not personally receive those proceeds.

The courts of appeals have divided over that question. In the decision below, the Sixth Circuit held that "§ 853 mandates joint and several liability among coconspirators for the proceeds of a drug conspiracy." Pet. App. 25a-26a. The Sixth Circuit observed that its decision was consistent with the decisions of "[a] number of other circuits," Pet. App. 26a. But it expressly acknowledged that its decision conflicted with *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015), which "held that § 853 does not countenance joint and several liability." Pet. App. 26a. Rather, *Cano-Flores* held that a defendant is required to forfeit only those "funds that actually *reach* the defendant." 796 F.3d at 92 (emphasis in original). Judge Moore's concurring opinion conceded that the panel opinion was mandated by binding Sixth Circuit precedent, but she argued that the "prior panel was likely incorrect" and that *Cano-Flores* was correctly decided. Pet. App. 29a, 32a.

This case is a perfect vehicle to resolve the circuit split. The government expressly conceded in the District Court that Petitioner "did not stand to benefit personally from the illegal sales," Pet. App. 60a, and the District Court found that Petitioner had not "personally ... profited from the illegal conspiracy." Pet. App. 40a. The Sixth Circuit nonetheless ordered forfeiture based entirely on its application of the legal rule that Petitioner must be jointly and severally liable for forfeiture of the proceeds obtained by his co-conspirator. Thus, this case squarely presents the question of whether that legal rule is correct.

The question presented in this case recurs frequently and is the subject of an acknowledged conflict of authority. The Court should grant certiorari to resolve the conflict.

STATEMENT OF THE CASE

A. Petitioner's Drug Convictions

Petitioner Terry Honeycutt worked as the salaried employee in charge of sales and inventory at a hardware store in Tennessee called the Brainerd Army Store. Pet. App. 2a. Petitioner's brother, Tony Honeycutt, co-owned the store. Pet. App. 2a.[1] The Brainerd Army Store stocked an iodine-based water purification product known as Polar Pure. Pet. App. 2a. In 2008, Petitioner noticed an increased number of "edgy looking folks" purchasing Polar Pure. Pet. App. 2a. He promptly contacted the Chattanooga Police Department to ask whether Polar Pure could be used to

[1] Petitioner's father, Bill Honeycutt, was the other co-owner.

manufacture methamphetamine. Pet. App. 2a. The Chattanooga Police Department advised Petitioner that it could, and urged him not to sell Polar Pure if he felt "uncomfortable." Pet. App. 2a. The Brainerd Army Store continued to sell Polar Pure, however, and sold it to undercover officers. Pet. App. 2a-3a.

Petitioner and his brother were both indicted for federal drug crimes related to the sale of Polar Pure. Petitioner's brother pleaded guilty, but Petitioner went to trial. Pet. App. 4a. A jury convicted Petitioner of two counts of conspiracy to distribute iodine, while knowing or having reasonable cause to believe that it would be used to make methamphetamine, in violation of 21 U.S.C. §§ 841(c), 843(a)(6), and 846. Pet. App. 4a, 5a; *see also* Pet. App. 63a-68a (second superseding indictment). The jury also convicted Petitioner of nine other counts related to the possession and distribution of iodine, while acquitting him of three counts. Pet. App. 4a.

B. Forfeiture Proceedings in District Court

Petitioner's indictment specified that the government would be seeking forfeiture in the amount of $269,751.98. Pet. App. 67a. After trial, the government sought forfeiture in that amount. The government contended that this figure corresponded to the Brainerd Army Store's "total profit from iodine sales." Pet. App. 52a. Because Petitioner's brother had already forfeited $200,000 pursuant to his plea agreement, the government argued that Petitioner should have to forfeit the remaining $69,751.98. Pet. App. 39a, 62a.

Petitioner, however, argued that he should not have to forfeit the Brainerd Army Store's profits from the sale of Polar Pure, because he never received any of those profits—they flowed solely to his brother, the owner of the Brainerd Army Store. Petitioner pointed out that he did not have any ownership interest in the Brainerd Army Store. To establish this point, he relied on documentary evidence establishing that he had no ownership interest, Dkt. 107, Ex. A (Brainerd Army Store's annual corporate reports filed with Tennessee Secretary of State).[2] He also testified at trial that he held no ownership interest in the store. Pet. App. 72a-73a. Petitioner also pointed out that he had no authority to withdraw money from the Brainerd Army Store's Bank of America account. Again, to prove this point, Petitioner proffered documentary evidence, in the form of bank records. Dkt. 107, Ex. B (Bank of America records). His trial testimony confirmed his lack of authority on the bank account. Pet. App. 74a.

The District Court then solicited additional briefing on whether Petitioner should be liable for forfeiture. In its brief, the government acknowledged that Petitioner "did not have a controlling interest in the store selling the listed chemical and did not stand to benefit personally from the illegal sales." Pet. App. 60a. It argued, however, that because "defendant's coconspirator did have an ownership role and did stand

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[2] All citations to "Dkt." are to the District Court docket at *United States v. Honeycutt*, No. 1:12-cv-00144-HSM-WBC (E.D. Tenn.). All materials cited in this petition are available on PACER.

to benefit personally from the $269,751.98 in profit from the sales of the listed chemical ... the Court should hold the defendant jointly liable for the profit from the illegal sales." Pet. App. 60a-61a.

The District Court declined to require forfeiture. In its oral decision, the court noted that the "Brainerd Army Store itself" was not "a criminal enterprise," and that "some of the Polar Pure was being used for legal purposes." Pet. App. 39a. The court stated that it was "cognizant that the statute mandates that I do order forfeiture if the proceeds were directly or indirectly derived from the criminal enterprise." Pet. App. 40a. It acknowledged that Petitioner "was involved in a criminal conspiracy," but nonetheless concluded that "it's difficult for me to say that [Petitioner] personally ... profited from that illegal conspiracy." Pet. App. 40a. The District Court relied on Petitioner's "lack of an ownership interest in the Brainerd Army Store," noting that Petitioner was "a salaried employee." Pet. App. 40a. The Court also explained that "the government has conceded" that "what Mr. Honeycutt's financial motivations may have been, are just not clear in this case." Pet. App. 40a. The Court therefore "decline[d] to order forfeiture against [Petitioner] in this case." Pet. App. 41a.

C. Sixth Circuit's Decision

The Sixth Circuit reversed the District Court's decision not to order forfeiture. It concluded that Petitioner was jointly and severally liable for all of the conspiracy's profits, regardless of whether he ever received those profits. Pet. App. 24a-28a.

The court noted that there was a conflict of authority on whether § 853(a)(1) countenances joint and several liability for co-conspirators. As the court observed, four courts of appeals have held that "§ 853 mandates joint and several liability among coconspirators for the proceeds of a drug conspiracy." Pet. App. 25a-26a (citing decisions from the Second, Third, Fourth, and Eighth Circuits). "On the other hand," the court noted, the D.C. Circuit "has held that has held that § 853 does not countenance joint and several liability." Pet. App. 26a (citing *Cano-Flores*, 796 F.3d at 90-95).

The court found it "unnecessary to probe the reasoning of *Cano-Flores*," because in its view, it was precedentially bound by a prior Sixth Circuit decision which imposed joint-and-several liability under RICO's forfeiture provision. Pet. App. 26a-27a (citing *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000)). The court held that "[a]lthough *Corrado* did not specifically concern § 853, the relevant language and structure of the two statute's forfeiture provisions are virtually identical," and that *Corrado* therefore required the court to impose joint-and-several liability on Petitioner. Pet. App. 27a-28a. The court noted that "the D.C. Circuit's criticisms in *Cano-Flores*, 796 F.3d at 90-95—if valid—would apply with equal force to both the RICO and § 853 forfeiture provisions. And so, again, we would need to overrule *Corrado* if we were to follow *Cano-Flores*." Pet. App. 28a n.3.

Judge Moore concurred in the judgment. She acknowledged that *Corrado* dictated that Petitioner be held jointly and severally liable for all of the profits

from Polar Pure. But she wrote "to emphasize why that prior panel was likely incorrect, and to suggest that the full court consider the issue en banc." Pet. App. 29a.

Judge Moore explained that § 853(a)(1) requires forfeiture only of illicit property that a defendant "obtained," yet Petitioner never obtained anything—his brother did. As Judge Moore observed, "a lack of evidence suggesting that Honeycutt 'obtained' anything would seem to be problematic," and concluded that the imposition of joint-and-several liability is "contrary to the statute." Pet. App. 30a-31a. Judge Moore acknowledged that several circuits had held that § 853(a)(1) and RICO's forfeiture statute require joint-and-several liability, but that those decisions "largely gloss over the statutory text." Pet. App. 32a. She noted that "[a]lthough no contrary authority existed when we decided *Corrado*," the D.C. Circuit had reached the contrary conclusion in *Cano-Flores*. Pet. App. 32a. She concluded that "[t]he D.C. Circuit's textual argument is more thorough than any conducted by the many circuits that hold that joint-and-several liability is available, and it persuades me that we should reconsider *Corrado*." Pet. App. 32a.

Judge Moore rejected the reasoning of other circuits which had imposed joint-and-several liability based on *Pinkerton v. United States*, 328 U.S. 640 (1946), which holds that conspirators are liable for the reasonably foreseeable crimes of their co-conspirators. Relying on *Cano-Flores*, Judge Moore explained that "the *Pinkerton* doctrine 'speaks only to a defendant's substantive liability—not to the consequences of such

liability' ... making it an especially thin basis for overruling the statute's plain text." Pet. App. 33a (quoting *Cano-Flores*, 796 F.3d at 94). Judge Moore also argued that "the general rule that §§ 853(a) and [the RICO forfeiture statute] be construed broadly," is not "a sufficient reason to override their plain language." Pet. App. 33a.

Judge Moore was "sensitive to concerns that precluding joint-and-several liability may frustrate the government's ability to collect illicit proceeds," but was "not convinced that the absence of joint-and-several liability would frustrate collections as much as these decisions anticipate." Pet. App. 33a-34a. Moreover, she noted that even without joint and several liability, a "higher-level conspirator" who "ultimately controls" and "reaps the financial benefits of the illegal operation" could still be subject to a forfeiture judgment. Pet. App. 34a. She concluded by reiterating that "en banc consideration is appropriate." Pet. App. 34a.

Petitioner filed a timely petition for rehearing en banc, which the court denied on May 31, 2016. Pet. App. 47a-48a.

REASONS FOR GRANTING THE WRIT

This case meets all of this Court's criteria for granting certiorari. As the Sixth Circuit acknowledged, its decision is consistent with the decisions of several other circuits, but conflicts with *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015). The arguments on both sides of the split have been fully aired in the courts of appeals, and only this

Court can resolve the conflict. The question presented is important and recurs frequently, and this case provides a perfect vehicle. The Court should grant certiorari.

I. THERE IS A CIRCUIT SPLIT ON THE QUESTION PRESENTED

A. Like the Sixth Circuit, the Second, Third, Fourth, and Eighth Circuits Have Interpreted § 853(a)(1) To Impose Joint and Several Liability On All Co-Conspirators.

In the decision below, the Sixth Circuit concluded that § 853(a)(1) mandates joint and several liability among coconspirators for forfeiture of the proceeds of a drug conspiracy. The Second, Third, Fourth, and Eighth Circuits have reached the same conclusion.

Second Circuit. In *United States v. Benevento*, 836 F.2d 129 (2d Cir. 1988) (per curiam), the Second Circuit concluded that "the forfeiture provision" of § 853(a)(1) "creates joint and several liability" and is not "limited to the share of proceeds equivalent to [a co-conspirator's] ownership interest in the criminal enterprise." *Id.* at 130. The Second Circuit adopted the reasoning of the District Court decision under review, *id.*, which in turn concluded that joint and several liability was necessary to avoid "giv[ing] criminals an incentive to engage in complex financial transactions in order to hide their share of the proceeds." *United States v. Benevento*, 663 F. Supp. 1115, 1118 (S.D.N.Y. 1987). The Second Circuit reaffirmed its interpretation of § 853(a)(1) in *United States v. Roberts*, 660 F.3d 149 (2d Cir. 2011), holding that "[i]n the case of a narcotics

conspiracy," "mandatory liability" for forfeiture "is joint and several among all conspirators." *Id.* at 165.

Third Circuit. In *United States v. Pitt*, 193 F.3d 751 (3d Cir. 1999), the Third Circuit similarly concluded that "21 U.S.C. § 853(a)(1) imposes joint and several liability with respect to forfeiture." *Id.* at 765. In reaching that conclusion, the Third Circuit cited the Fourth Circuit's decision in *United States v. McHan*, discussed *infra*. *Id.* It also relied on its analysis of the federal statute mandating forfeiture of money-laundering proceeds, in which it explained: "The statute does not say that each conspirator shall forfeit only such property involved in the offense which is or has ever been in that conspirator's possession. Rather, the statute recognizes that the amount of property ... cannot be different for different conspirators." *Id.*

Fourth Circuit. The Fourth Circuit reached the same conclusion in *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996), holding that § 853(a)(1) "is not limited to property that the defendant acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise." *Id.* at 1043. The court reasoned:

> Just as conspirators are substantively liable for the foreseeable criminal conduct of a conspiracy's other members, *see Pinkerton v. United States*, [328 U.S. 640] (1946), they are responsible at sentencing for co-conspirators' "reasonably foreseeable acts and omissions ... in furtherance of the jointly undertaken criminal activity," U.S.S.G. § 1B1.3(a)(1)(B) (Relevant

> Conduct). ... Because a criminal forfeiture ordered under § 853(a) is "an element of the [defendant's] sentence," *Libretti v. United States*, [516 U.S. 29, 38-39] (1995), it follows that conspirators should be liable under § 853 for their drug partnerships' receipts.

Id.

Eighth Circuit. *United States v. Van Nguyen*, 602 F.3d 886 (8th Cir. 2010), adopted the same view of § 853(a)(1). The court concluded that under § 853, the defendant "may be held jointly and severally liable for all of the foreseeable proceeds of the conspiracy." *Id.* at 891, 904. The court cited its own prior decision in *United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998), which took the same view of the RICO forfeiture statute; the *Simmons* court relied on "the traditional rules with respect to criminal conspiracy, under which all members of a conspiracy are responsible for the foreseeable acts of co-conspirators taken in furtherance of the conspiracy." *Id.* at 770. The Eighth Circuit reiterated its interpretation of § 853(a)(1) in *United States v. Elder*, 682 F.3d 1065 (8th Cir. 2012), holding that in "a forfeiture under 21 U.S.C. § 853(a)(1)," "[a] conspirator's forfeiture liability is not limited to the amount the government proves he personally obtained. He is jointly and severally liable to forfeit the proceeds of the criminal enterprise," as long as they "were reasonably foreseeable to him." *Id.* at 1073.[3]

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[3] As the Sixth Circuit noted below, RICO's forfeiture statute is closely similar to § 853(a)(1). *See* Pet. App. 27a (noting that RICO's forfeiture provision is "virtually identical" to

B. The D.C. Circuit Has Held That § 853(a)(1) Does Not Impose Joint-and-Several Liability, and Instead Requires Forfeiture Only of Those Funds Which Actually Reach the Defendant.

In *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015), the D.C. Circuit concluded that § 853(a)(1) "does not authorize imposition of a forfeiture based on the total revenues of a conspiracy simply because they may have been reasonably foreseeable." *Id.* at 91. Rather, the court read "the statutory language as providing for forfeiture *only* of amounts 'obtained' by the defendant on whom the forfeiture is imposed"—that is, only "funds that actually *reach* the defendant." *Id.* at 91-92. The court acknowledged that other courts of appeals had reached the contrary conclusion, but "respectfully disagree[d]" with the conclusions of those courts. *Id.* at 91.

The court's detailed analysis began "with the statutory text itself." *Id.* The court observed that the forfeiture obligations extends only to "property that a defendant has 'obtained,'" and that "the government's view reads the word 'obtained' out of the statute." *Id.*

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the forfeiture provision in § 853(a)(1)); Pet. App. 30a-31a (concurring opinion) (same). Four additional courts of appeals have held that RICO's forfeiture statute requires joint and several liability for co-conspirators. *See United States v. Hurley*, 63 F.3d 1, 22 (1st Cir. 1995); *United States v. Edwards*, 303 F.3d 606, 643-44 (5th Cir. 2002); *United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003); *United States v. Caporale*, 806 F.2d 1487, 1509 (11th Cir. 1986).

It observed that "[i]n ordinary English a person cannot be said to have 'obtained' an item of property merely because *someone else* (even someone else in cahoots with the defendant) foreseeably obtained it." *Id.* It rejected the government's argument that joint-and-several liability was necessary to give meaning to the portion of the statute requiring forfeiture of illicit property obtained "indirectly," finding that "'indirectly' can be meaningfully understood in ways completely consistent with giving 'obtained' its ordinary meaning." *Id.* It gave the examples of "any situation where funds are transferred by a victim (or purchaser) to a defendant through an intermediary"; situations where an employee "may receive increased compensation as an indirect benefit of the fraud"; and situations where property is "received by persons or entities that are under the defendant's control" or "applied to the benefit of persons for whom that defendant has a legal or moral obligation of support." *Id.* at 92. The court also noted that the government's interpretation is at odds with the Sentencing Guidelines, which assume that "proceeds 'indirectly' obtained by a violator refer exclusively to proceeds actually obtained by him *individually*." *Id.* (emphasis in original).

The court next "turn[ed] to the reasoning of the decisions that ... adopt a view equivalent to the government's." *Id.* at 93. The court first rejected the reasoning of courts which relied on the admonition in § 853(o) that the statute should be construed "liberally" in order "to effectuate its remedial purposes." The court explained that there was no evidence that Congress had the "purpose" of expanding the amount

of property subject to forfeiture, and that "even if Congress explicitly asserts a particular purpose, the courts do not assume that it intended to pursue that purpose to the exclusion of all others." *Id.* at 93 (internal quotation marks omitted). The court also noted that the rule of lenity, and the canon of constitutional avoidance, weighed against the government's interpretation. *Id.* 93-94.

The court also rejected its sister circuits' reliance on *Pinkerton v. United States*, 328 U.S. 640 (1946), which held that members of a conspiracy are liable for the foreseeable criminal conduct of their co-conspirators. The court explained that "vicarious liability's supposed 'resonance' with *Pinkerton* seems a woefully inadequate reason for disregarding the normal meaning of the word 'obtained.'" 796 F.3d at 94. It noted that Congress "made no mention of the case or the principle in either the statute or in the legislative history," and that "*Pinkerton*, even on its own terms, is a doctrine which speaks only to a defendant's substantive liability—not to the consequences of such liability." *Id.* The court observed that applying *Pinkerton* to forfeitures would cause forfeiture amounts to balloon at a much greater rate than imprisonment lengths relative to the size of the conspiracy. *Id.* at 94-95.

Finally, the court stated that "the language of 'joint and several liability' is derived from torts, but the courts invoking it have not deeply considered where there is a sound analogy between forfeiture and tort law. We doubt there is one." *Id.* at 95. The court explained that the rationale for joint and several liability in tort law is "the judgment that it is better

that the risk of an insolvent co-defendant should fall on a partially guilty defendant than on a completely innocent victim." *Id.* It acknowledged that "the tort analogy might well apply to *restitution* in a criminal case," and that courts are indeed authorized to apply joint and several liability in the restitution context, but "the reasoning doesn't extend to forfeitures, which are collected by the government." *Id.* The court also noted that "in the normal tort case a defendant who is jointly and severally liable has at least a chance of securing contribution from co-defendants, but there appears to be no suggestion by any court imposing joint and several liability that defendants would have a right of contribution among themselves." *Id.* (internal citation omitted).

II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW.

This case meets all of the Court's criteria for granting certiorari. First, it presents an intractable and developed circuit split on a recurring question that only this Court can resolve. Second, it is a flawless vehicle.

A. This Court Should Resolve the Circuit Split.

This case merits the Court's review. As the large number of cases on this issue attests, the question presented recurs frequently. That is not surprising, given that forfeiture of ill-gotten property is mandatory under § 853(a)(1). *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied, or

broader words to define the scope of what was to be forfeited."). Thus, the question presented can arise in any case involving a drug conspiracy in which any member of the conspiracy earns money from drug crimes.

Only this Court can resolve the conflict of authority between the D.C. Circuit and its sister circuits. There is no realistic possibility of the D.C. Circuit reconsidering *Cano-Flores*: *Cano-Flores* was a decision by a unanimous panel, which expressly considered and rejected the reasoning of cases from other circuits, and the government declined to file a petition for rehearing en banc or a petition for certiorari. Nor is the Sixth Circuit likely to reconsider its position—it denied rehearing en banc in the case below, notwithstanding Judge Moore's contrary recommendation. Thus, the circuit split will persist until this Court grants certiorari to resolve it.

There is no need for additional percolation. Five circuits have considered whether § 853(a)(1) provides for joint-and-several liability in decisions dating back to 1988, and an additional four have considered the issue in the RICO context. Although the majority of circuits have sided with the government, the D.C. Circuit's decision rejecting the government's position contains by far the most detailed analysis of any case on either side of the split. The arguments on both sides of the split have now been fully aired, and the question is ripe for this Court's review.

The Court should not be deterred by the fact that the D.C. Circuit is the only circuit on its side of the split. The Court routinely grants certiorari in cases

when one side of the split is represented by only one circuit–including cases involving far less developed circuit splits than this one. Indeed, it did so in seven federal criminal cases last Term. *See Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split); *Nichols v. United States*, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split); *Lockhart v. United States*, 136 S. Ct. 958 (2016) (5-1 split); *Voisine v. United States*, 136 S. Ct. 2272 (2016) (approximately 9-1 split).

Finally, this Court's review is especially warranted because the circuit split creates the prospect of venue manipulation by the government in drug conspiracy investigations. In conspiracy cases, venue is proper in any jurisdiction where any co-conspirator has committed an overt act in furtherance of the conspiracy. *See Hyde v. United States*, 225 U.S. 347, 356-67 (1912). Thus, for example, if a member of a D.C. drug conspiracy engages in an overt act in Maryland or Virginia, all co-conspirators can be prosecuted there. Federal investigators conducting sting operations will have a powerful incentive to induce a co-conspirator to leave D.C., in order to ensure that all co-conspirators can be charged within the Fourth Circuit and subjected to the Fourth Circuit's joint-and-several liability rule. Federal law should be uniform; the incentives of law enforcement officials should not be affected by diverging interpretations of federal law in different jurisdictions. Only this Court can harmonize the meaning of federal law nationwide.

B. This Case is a Perfect Vehicle.

The straightforward facts of this case make it a strong vehicle to consider the question presented. The government effectively conceded in the District Court that Petitioner would not be liable for forfeiture under the D.C. Circuit's approach in *Cano-Flores*, and rested its forfeiture case on the principles that co-conspirators should be jointly and severally liable. Thus, the Sixth Circuit's application of a joint-and-several liability rule was plainly outcome-determinative.

After Petitioner was convicted, the government argued that Petitioner should be jointly and severally liable for forfeiture of $269,751.98, which consisted of the profits from the sales of Polar Pure during the period of the conspiracy. Pet. App. 51a-52a. In seeking forfeiture of those profits, the government relied exclusively on principles of joint-and-several liability; it expressly admitted that Petitioner "did not stand to benefit personally from the illegal sales." Pet. App. 60a. Here is the complete quotation from the government's brief:

> Admittedly, the defendant did not have a controlling interest in the store selling the listed chemical and did not stand to benefit personally from the illegal sales. However, the defendant's coconspirator did have an ownership role and did stand to benefit personally from the $269,751.98 in profit from the sales of the listed chemical. Because the jury convicted the defendant of a conspiracy with the defendant's coconspirator, the Court should hold the defendant jointly liable for the profit from the illegal sales. As the

> employee responsible for ordering products and inventory (doc. 104, Tr. Defendant's Testimony at 41, 43) and because the defendant had knowledge of both the use of the listed chemical in the manufacture of methamphetamine and law enforcement had warned the defendant, the sales and proceeds from those sales were reasonably foreseeable.

Pet. App. 60a-61a.

In view of the government's concession that Petitioner had not personally benefitted from the illegal sales, the District Court declined to order forfeiture. It concluded that "it's difficult for me to say that Mr. Terry Honeycutt personally, you know, profited from that illegal conspiracy." Pet. App. 40a. It found that Petitioner's "financial motivations ... are just not clear in this case." Pet. App. 40a. The Sixth Circuit reversed the District Court, but it did not question the District Court's factual finding that Petitioner did not profit from the conspiracy. Instead, the Sixth Circuit premised its decision entirely on its view that joint and several liability was required under § 853(a)(1).

Thus, the Sixth Circuit's application of a rule of joint and several liability dictated the outcome of this case. This case is an ideal vehicle for the Court to consider whether that rule is correct.

III. THE SIXTH CIRCUIT'S DECISION IS WRONG.

The Sixth Circuit erred in holding that § 853(a)(1) mandates joint and several liability among co-conspirators. The D.C. Circuit's interpretation of

§ 853(a)(1), under which a defendant is liable for forfeiture only of the proceeds that actually reach that defendant, is correct. Because the profits from the sale of Polar Pure flowed only to Petitioner's co-conspirator, Petitioner should not have been held liable for forfeiture of those profits.

The statutory text resolves this case. Under 21 U.S.C. § 853(a)(1), a defendant must forfeit illicit proceeds that he "obtained." Petitioner did not "obtain" $269,751.98; his brother did. *See Cano-Flores*, 796 F.3d at 91 ("In ordinary English a person cannot be said to have "obtained" an item of property merely because *someone else* (even someone else in cahoots with the defendant) foreseeably obtained it."). Therefore, he should not have been held jointly and severally liable for that sum.

The fact that the statute mandates forfeiture of illicit proceeds obtained "directly or indirectly" does not change the analysis. As the D.C. Circuit explained in *Cano-Flores*, "'indirectly can be meaningfully understood in ways completely consistent with giving 'obtained' its ordinary meaning." *Id.* For instance, a defendant "indirectly" obtains funds when "funds are transferred ... to a defendant through an intermediary," when he "receive[s] increased compensation as an indirect benefit of the fraud," or when property is received by "persons or entities that are under the defendant's control" or is "applied to the benefit of persons for whom that defendant has a legal or moral obligation of support." *Id.* at 92. But the government never made any such showing with respect to Petitioner. Instead, it argued that merely because

Petitioner's co-conspirator obtained the profits of Polar Pure, Petitioner himself should be required to forfeit those profits. That holding read the word "obtained" out of the statute.

Congress is well aware of how to draft a statute imposing joint-and-several liability. In the restitution context, Congress provided: "If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. § 3664(h). Thus, Congress expressly granted a *permissive* rule of joint-and-several liability in the context of restitution. Congress enacted no analogous provision with respect to forfeiture, and the Sixth Circuit had no basis to impose a *mandatory* rule of joint-and-several liability based only on the term "obtained."

The government's interpretation is also inconsistent with the statutory purpose. "In enacting § 853, Congress decided to give force to the old adage that 'crime does not pay.'" *Monsanto*, 491 U.S. at 614. Thus, a person who actually *receives* tainted assets must give up those assets, so as not to benefit from his crimes. But that rationale does not apply to defendants such as Petitioner, who never received those assets. Forfeiture judgments imposed on defendants who never received any tainted assets are the functional equivalent of large criminal fines—except they are imposed without regard to the procedural protections in 18 U.S.C. § 3572(a), which require a court to consider

factors such as the defendant's income, the burden the fine will pose on the defendant, and other considerations that are irrelevant to the calculation of a forfeiture judgment.

In fact, joint-and-several liability actually *undermines* the government's goal of ensuring that "crime does not pay," because every dollar forfeited by a co-conspirator that did *not* receive the assets is a dollar that a co-conspirator who *did* receive the assets is allowed to keep. Consider the case of two co-conspirators, one of whom obtained $200,000 from the crime and one of whom obtained nothing. Suppose both are held jointly and severally liable for a $200,000 forfeiture judgment, and both end up satisfying $100,000 of that judgment. As the D.C. Circuit observed in *Cano-Flores*, the defendant who obtained nothing has no legal right of contribution against his co-conspirator who obtained $200,000. 796 F.3d at 95. Thus, the co-conspirator who earned $200,000 will only pay $100,000 – which means that he actually ends up retaining $100,000 that he earned as a result of his criminal activity.

Joint-and-several liability cannot be justified based on § 853(o), which states that the statute should be construed "liberally" in order "to effectuate its remedial purposes." *Cano-Flores*, 796 F.3d at 93 (quotation marks omitted). As the D.C. Circuit explained in detail, there is no evidence that joint-and-several liability is consistent with the statutory purpose. *Id.* Indeed, as explained above, it arguably *undermines* that purpose. Nor can a liberal-construction rule be used to override the unambiguous

text of § 853(a)(1), which requires forfeiture only of assets that a defendant "obtained."

Joint-and-several liability cannot be justified based on an analogy to *Pinkerton v. United States*, 328 U.S. 640 (1946). *Pinkerton*'s reasoning focused exclusively on the fact that a defendant could be held liable for his co-conspirator's *mens rea* and *actus reus*. 328 U.S. at 647. Thus, as the D.C. Circuit correctly explained, "*Pinkerton*, even on its own terms, is a doctrine which speaks only to a defendant's substantive liability—not to the consequences of such liability." 796 F.3d at 94.

Indeed, joint-and-several liability is contrary to the *Pinkerton* rule as ordinarily understood. Under *Pinkerton*, if five defendants are held liable for the substantive crime of one co-conspirator, they are assessed five separate criminal sentences and criminal fines, which they must satisfy individually; one defendant's payment of a criminal fine does not satisfy a co-defendant's obligation to pay a criminal fine. Joint-and-several liability is a concept borrowed not from *Pinkerton*, but instead from tort law. But as the D.C. Circuit explained, the analogy to tort law does not work, because the purpose of joint-and-several liability is to ensure complete *compensation*. *Cano-Flores*, 796 F.3d at 95. Thus, joint-and-several liability may make sense in the context of restitution—and, as noted above, Congress has indeed explicitly authorized joint-and-several liability in that context. But it does not make sense in the context of forfeiture, where the goal is to require a defendant to surrender ill-gotten gains to the government, not to compensate a victim. *See id.*

Finally, the D.C. Circuit observed in *Cano-Flores*

that the absence of any right of contribution was an indication that Congress did not intend to impose joint-and-several liability. *Id.* In *Paroline v. United States*, 134 S. Ct. 1710 (2014), this Court similarly held that the absence of a federal right of contribution was evidence that Congress did not intend to impose joint-and-several liability in the context of restitution for victims of child pornography crimes. *Id.* at 1725. That reasoning applies with full force here. Given that the tort-law concept of contribution does not apply in the forfeiture context, courts should not import the tort-law concept of joint and several liability into the law of forfeiture.

The Sixth Circuit erred in holding Petitioner jointly and severally liable for forfeiture of a drug crime's proceeds that he never personally obtained. The judgment of the Sixth Circuit should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff–Appellee/Cross–Appellant,

v.

TERRY MICHAEL HONEYCUTT,
Defendant–Appellant/Cross–Appellee.

Nos. 14–5790, 14–5850.
Argued: Dec. 2, 2015.
Decided and Filed: March 4, 2016.

Before: SILER, MOORE, and GIBBONS, Circuit Judges.

OPINION

SILER, Circuit Judge.

A jury convicted Defendant Terry Honeycutt ("Honeycutt") of eleven counts of conspiring to and knowingly distributing iodine while knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. §§ 841(c)(2), 843(a)(6), and 846. The district court sentenced Honeycutt to concurrent terms of 60 months' imprisonment for each count, but declined to order any forfeiture. Honeycutt now appeals his conviction, and the Government cross-appeals on the issue of forfeiture. For the following reasons, we **AFFIRM** Honeycutt's § 841(c)(2) convictions,

VACATE his sentences on the § 843(a)(6) convictions, and **REVERSE** the district court's determination that forfeiture is not warranted.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Factual Background

Honeycutt worked as the salaried employee in charge of sales and inventory in the Brainerd Army Store—which was owned by his brother (and codefendant), Tony Honeycutt ("Tony"). In 2008, having noticed an increasing number of "edgy looking folks" purchasing Polar Pure, an iodine-based water purification product, Honeycutt called the Chattanooga Police Department to ask if the iodine in Polar Pure could be used to manufacture methamphetamine. He spoke to Tommy Farmer, Director of the Tennessee Meth and Pharmaceutical Task Force, who confirmed that Polar Pure was being used to manufacture methamphetamine throughout the community and urged Honeycutt not to sell it "if [he] fe[lt] uncomfortable about it." Afterwards, Director Farmer informed the Police Department and the Drug Enforcement Administration ("DEA") that Honeycutt was selling Polar Pure.

The Brainerd Army Store was the only local retailer that stocked Polar Pure; the product was kept out of sight behind the sales counter, and only Honeycutt and his brother sold it. Each bottle of Polar Pure contains about eight grams of iodine crystals that, if used as instructed, could purify up to five hundred gallons of water. Over time, Honeycutt sold increasing

quantities of iodine, including as many as twelve bottles of Polar Pure in a single transaction (i.e., enough iodine to purify six thousand gallons of water).

In 2009, the DEA, in conjunction with state and local law enforcement, began investigating the Polar Pure sales at the store. The investigation involved surveillance, monitoring of iodine sales, controlled buys by an undercover agent, direct conversations with Honeycutt and his brother, attempts by officers to convince the brothers to stop selling the product to meth producers, and, ultimately, the execution of a search warrant in 2010.

The search revealed that in a three-year period, Polar Pure became the store's highest-grossing item, generating upwards of $269,000 in profit from the sale of more than 20,000 bottles of Polar Pure. Upon questioning, Honeycutt indicated that he and his brother had adopted a "don't-ask-don't-tell" policy after discussions with their iodine supplier. Pursuant to the warrant, agents seized the store's inventory of 307 bottles of Polar Pure. Agent David Shelton testified that after the Brainerd Army Store closed, following the execution of the warrant, the meth labs using the red phosphorus method that required iodine dropped to an "insignificant level," becoming "rare" and "fairly non-existent" in the region.

II. Procedural History

A federal grand jury indicted the brothers for various offenses regarding their distribution of iodine while knowing or having reasonable cause to believe it would be used to manufacture methamphetamine.

Tony pled guilty, and Honeycutt went to trial. Honeycutt was acquitted of three charges in the indictment, and convicted of the remaining eleven—which involved conspiring to and knowingly distributing iodine in violation of 21 U.S.C. §§ 841(c)(2), 843(a)(6), and 846—although at sentencing the district court merged the counts of the §§ 841(c)(2) and 843(a)(6) offenses that occurred on the same day.

The district court sentenced Honeycutt to concurrent terms of 60 months' imprisonment for each count. It declined to order any forfeiture, reasoning in particular that, as a salaried employee, Honeycutt did not reap the proceeds of the conspiracy.

DISCUSSION

I. Sufficiency of the Evidence

A. Waiver

As a threshold matter, Honeycutt disputes the sufficiency of the evidence at various points in his appeal, and yet no sufficiency challenge appears in his statement of the issues. Federal Rule of Appellate Procedure 28(a) explicitly states that an "appellant's brief *must* contain ... a statement of the issues presented for review." Fed. R.App. P. 28(a)(5) (emphasis added); *United States v. Baylor*, 517 F.3d 899, 903 (6th Cir. 2008). Because Honeycutt failed to list these evidentiary challenges among his nine issues presented on appeal, we could dismiss Honeycutt's sufficiency arguments as waived. *See, e.g., Barrett v. Detroit Heading, LLC*, 311 Fed. Appx. 779, 796 (6th Cir. 2009) (holding that "[t]he provisions of Rule 28(a)

are ... unambiguously mandatory," and deeming waived an argument not listed in the statement of issues presented). Even assuming that this issue was properly preserved, however, his arguments are plainly meritless.

B. Standard of Review

Evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" when "*all of the evidence* is ... considered." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

C. Conspiracy to Violate §§ 841(c)(2) and 843(a)(6)

To prove the existence of the conspiracy alleged in Counts One and Two, "the government was required to prove, beyond a reasonable doubt, '(1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy.'" *United States v. Pritchett*, 749 F.3d 417, 431 (6th Cir. 2014) (quoting *United States v. Gibbs*, 182 F.3d 408, 420 (6th Cir. 1999)). Here, the Government presented ample evidence for a rational juror to convict Honeycutt of conspiracy to violate §§ 841(c)(2) and 843(a)(6).

Regarding the first element, the evidence showed that Honeycutt and his brother jointly agreed to violate the drug laws by providing iodine for the manufacture of methamphetamine. On November 23, 2009, Tony

said, in Honeycutt's presence, "we really don't ask and [the customers] don't tell" why they are buying iodine—even though they had been warned that the type of iodine they were selling was preferred by meth cooks. In 2010, Honeycutt told Agent Shelton that they adopted their don't-ask-don't-tell policy based on the advice of Bob Wallace, their iodine supplier. Honeycutt and his brother both admitted selling iodine, and they were the only ones selling iodine at the store. The evidence thus showed that the brothers shared "a tacit or mutual understanding among the conspirators [that] is sufficient" to show an agreement to violate the drug laws. *United States v. Gardner*, 488 F.3d 700, 710 (6th Cir. 2007).

As for the second and third elements, the evidence was more than adequate to establish Honeycutt's knowledge of and willing participation in the conspiracy. For instance, the placement of the iodine behind the counter out of view of regular customers, as well as Honeycutt's deceptive response to Agent Shelton's request for an estimate of the monthly iodine sales reflected knowledge of the conspiracy to violate drug laws and possible intent to delay discovery of the conspiracy. Knowledge of the conspiracy was also manifest in Honeycutt's assertion of a limit on iodine sales that was repeatedly exceeded. Finally, his knowledge of and participation in the conspiracy was proven by his possession and distribution of extraordinary quantities of iodine; his responsibility for the store inventory and for ordering iodine from the supplier; and his engagement in direct sales. With the increasing sales in the face of multiple warnings from

law enforcement officers, Honeycutt clearly demonstrated his knowledge about, and continued intent to participate in, the conspiracy.

D. Substantive Violations of §§ 841(c)(2) and 843(a)(6)

The evidence also sufficed to support Honeycutt's substantive convictions under §§ 841(c)(2) and 843(a)(6). To prove a violation of § 841(c)(2), the Government must establish that a defendant (1) knowingly or intentionally possessed a listed chemical while (2) knowing, or having reasonable cause to believe, that the listed chemical would be used to manufacture a controlled substance. *See Pritchett*, 749 F.3d at 428. Similarly, § 843(a)(6) requires that the Government prove that a defendant possessed a chemical or other item which could be used to manufacture a controlled substance, and, at the time of such possession, knew, intended, or had reasonable cause to believe it would be used in the manufacture of a controlled substance. *See United States v. Swafford*, 512 F.3d 833, 845 n. 7 (6th Cir. 2008). The main difference between the two provisions is that § 841(c)(2) requires that the chemical be listed and § 843(a)(6) does not. In this case, the Government presented sufficient evidence for a rational juror to convict Honeycutt of violating both statutes.

With respect to the element of possession, the store's records reflected the sale of more than 20,000 bottles of iodine, and only Honeycutt and his brother sold it.

As for the element of knowing, or having reasonable cause to believe, that the iodine would be used to manufacture a controlled substance, Honeycutt was familiar with the manufacturing process for methamphetamine. He knew cooking meth requires pseudoephedrine, and he understood that although iodine is used in the process, it is not part of the finished product.

Despite repeated warnings by several law enforcement officers that the iodine he was selling was flowing directly into the meth labs of the area, Honeycutt nonetheless continued to sell Polar Pure. And again, although it became the store's best-selling product, he did not display it openly, but rather hid it under the sales counter and sold it only to those customers who requested it—and did so on a don't-ask-don't-tell basis. Moreover, when agents asked Honeycutt to look at photos of suspects who they believed purchased iodine at the store to cook meth, Honeycutt became visibly nervous, indicating that he knew, or reasonably should have known, that said customers were using his iodine to make methamphetamine.

II. Multiplicitous Convictions Under 21 U.S.C. §§ 841(c)(2) and 843(a)(6)

Honeycutt next argues that the district court erred by allowing the jury to consider the charged violations of both §§ 841(c)(2) and 843(a)(6). Asserting that "the district court erroneously treated [§§ 841(c)(2)] and [843(a)(6)] as redundant statutes," he contends that § 841(c)(2) applies only to listed chemicals, while

§ 843(a)(6) applies only to "unlisted" chemicals. Because the facts of his case did not involve an "unlisted" chemical, Honeycutt contends that "the 'mirrored' § 843(a)(6) counts reduced the Government's burden of proof, unduly confused the jury, and the result of the trial would have been different absent the § 843(a)(6) counts." He is mistaken.

First, he erroneously states that de novo review is the applicable standard. If he were claiming that he had actually been convicted and sentenced for multiplicitous counts in violation of the Double Jeopardy Clause, we would apply a de novo review to determine the issue of multiplicity. *See Swafford*, 512 F.3d at 844. However, when a district court permits multiplicitous counts to go to a jury and then merges them post-verdict, we apply an abuse-of-discretion standard in reviewing that decision. *See United States v. Throneburg*, 921 F.2d 654, 657 (6th Cir. 1990) ("[T]he district court has discretion in deciding whether to require the prosecution to elect between multiplicitous counts.... [and] [w]e may reverse only for an abuse of discretion.") (citing *United States v. Reed*, 639 F.2d 896, 904 n. 6 (2d Cir. 1981)).

Second, our decision in *Swafford* does not support his view that § 843(a)(6) applies only to "unlisted" chemicals, nor does *Swafford* dictate a different outcome from the district court's decision. In that case, we applied the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed. 306 (1932), determined that §§ 841(c)(2) and 843(a)(6) are in fact multiplicitous, and held that "[b]ecause

multiplicity exists, the charges must be merged under § 841(c)(2) to satisfy the prohibition against double jeopardy." *Swafford*, 512 F.3d at 844–46. In this case, the district court agreed with *Swafford* that the overlapping convictions were multiplicitous and remedied the issue by merging the convictions at sentencing.

We have previously held that multiplicity can be thus resolved. *Throneburg*, 921 F.2d at 657 ("[W]hen multiplicitous prosecutions and convictions occur, 'the only remedy consistent with the congressional intent is for the district court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions.'" (quoting *Ball v. United States*, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L.Ed.2d 740 (1985))).

III. The Jury Instructions and Verdict Form

A. Standard of review

Honeycutt challenges several of the jury instructions issued in this case. In reviewing jury instructions, we must determine "whether the charge, taken as a whole, fairly and adequately submit[ted] the issues and applicable law to the jury." *Fencorp, Co. v. Ohio Kentucky Oil Corp.*, 675 F.3d 933, 943 (6th Cir. 2012) (quoting *Fisher v. Ford Motor Co.*, 224 F.3d 570, 575–76 (6th Cir. 2000)). "While the correctness of jury instructions is a question of law, which we review *de novo*, the refusal to give a specifically requested instruction is reviewed for abuse of discretion. A judgment may be reversed only if the instructions, viewed as a whole, were confusing, misleading, or

prejudicial." *Id.* (quoting *Micrel, Inc. v. TRW, Inc.*, 486 F.3d 866, 881 (6th Cir. 2007) (internal citation omitted)). Moreover, absent a timely objection, we review only for plain error. *United States v. Newsom*, 452 F.3d 593, 605 (6th Cir. 2006).

B. Constructive Amendment of the *Mens Rea* for the Offenses

Honeycutt argues that the district court constructively amended the indictment, in that: (1) the jury instructions repeatedly described the violations as involving the possession and distribution of iodine while "knowing and having reasonable cause to believe that [it] would be used to manufacture methamphetamine," and (2) the verdict form summarized the charged offenses as distribution or possession of chemicals "used to manufacture methamphetamine." In Honeycutt's view, the jury instructions and verdict form invited the jury to convict him without proof of the requisite *mens rea*—that he knew or had reasonable cause to believe that the chemical "*will be used* to manufacture a controlled substance."

Insofar as he is challenging the district court's "would be used" phrasing—in light of the statutory language "will be used"—he did not raise that objection below. As "would" is the past tense of "will," *see* Oxford English Dictionary Online (3d ed. 2012) (under "will" definition), and as the jury was charged to assess Honeycutt's *mens rea* at the time of the offenses, the district court's use of "would" was entirely appropriate. Moreover, the district court said "will" and not "would" when reading the statutes, and we have previously

affirmed convictions under § 841(c)(2) where the jury was asked to decide whether the defendants possessed and distributed a listed chemical, "knowing and having reasonable cause to believe that the chemical *would* be used to manufacture methamphetamine." *Pritchett*, 749 F.3d at 428 (emphasis added). Thus, the district court's use of this phrasing in its jury instructions did not constitute error—plain or otherwise.

Regarding Honeycutt's claim that the indictment was constructively amended because the verdict form did not exactly mirror its language, he raised that concern during the charge conference, and suggested that the jury should receive only the indictment and a generic form on which to mark guilty or not guilty for each count. The district court refrained from changing the verdict form, but instead invited defense counsel to inform the jury during closing argument that the verdict form was simply a "condensed" version of the indictment. In its charge to the jury, the district court mentioned that the verdict form presented fourteen questions that corresponded to the indictment's fourteen counts, and emphasized that the verdict form did "not [contain] a complete statement, but a brief summary of the charges in the indictment." Moreover, after informing the jury that it would receive a copy of the indictment to review during deliberations, the district court reemphasized the summary nature of the verdict form. Therefore, Honeycutt cannot establish that the verdict sheet "so modif[ied] essential elements of the offense charged that there is a substantial likelihood that [he] may have been convicted of an offense other than that charged in

the indictment." *United States v. Barrow*, 118 F.3d 482, 488 (6th Cir. 1997) (quoting *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986)).

C. Constructive Amendment with the Term "Precursor Chemical"

Next, Honeycutt claims that, because the district court said "precursor chemicals" instead of "listed chemicals" at various points in its instructions and on the verdict form, "[t]he jury was permitted to assume that all 'chemicals' are treated alike in the law." However, not only did the district court clearly use the term "listed chemical" throughout its instructions, but this is not a case in which the jury heard evidence about multiple chemicals or controlled substances, not all of which would be sufficient to sustain a conviction; rather, iodine was the only "chemical" at issue in this case, and uncontroverted evidence established that iodine was a listed chemical. Accordingly, as with the prior claim, Honeycutt has failed to prove any constructive amendment of the indictment.

D. Entrapment by Estoppel Instruction

Honeycutt asserts that the Sixth Circuit pattern instruction about entrapment by estoppel improperly shifted the Government' burden of proof to him. However, given that entrapment by estoppel is an affirmative defense, the district court properly required Honeycutt to bear the burden of proof on that issue.

The challenged pattern instruction—which is principally based on the standard applied in *United*

States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992)—requires a defendant to prove the following factors by a preponderance of the evidence:

> First, that an agent of the United States government announced that the charged criminal act was legal.
>
> Second, that the defendant relied on that announcement.
>
> Third, that the defendant's reliance on the announcement was reasonable.
>
> Fourth, that given the defendant's reliance, conviction would be unfair.

6th Cir. Pattern Crim. Jury Instr. 6.09 Entrapment by Estoppel (2015). The Supreme Court has repeatedly upheld the practice of requiring a defendant to prove an affirmative defense by a preponderance of the evidence. *See, e.g., Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L.Ed.2d 281 (1977) ("Proof of the nonexistence of all affirmative defenses has never been constitutionally required.") (upholding a statute that required a defendant charged with murder to bear the burden of proof as to the affirmative defense of acting under extreme emotional distress).

Entrapment by estoppel is an affirmative defense that does not negate an element of either of the crimes charged here. As the Supreme Court has stated, "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Dixon v. United States*, 548 U.S. 1, 5, 126 S. Ct. 2437,

165 L.Ed.2d 299 (2006). "Knowingly" does not require knowledge that the facts underlying the criminal violation were unlawful. *See id.* (contrasting "knowingly" with "willfully," the latter of which "requires a defendant to have 'acted with knowledge that his conduct was unlawful'" (quoting *Bryan v. United States*, 524 U.S. 184, 193, 118 S. Ct. 1939, 141 L.Ed.2d 197 (1998))). Thus, the Government needed only to establish that Honeycutt acted knowingly, not that he knew his conduct was illegal.

By raising the defense of entrapment by estoppel, Honeycutt was not asserting that he did not know he was distributing iodine, nor that he did not know or have reasonable cause to believe that the iodine would be used to manufacture methamphetamine, but that government officials had led him to believe that such conduct was lawful. *See United States v. Triana*, 468 F.3d 308, 316 (6th Cir. 2006) (noting that the defense of entrapment by estoppel applies "when an official tells a defendant that certain conduct is legal and the defendant believes that official to his detriment") (citations omitted). Accordingly, the defense of entrapment by estoppel—like the defenses of necessity and duress—serves to "excuse conduct that would otherwise be punishable," yet "does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly." *Dixon*, 548 U.S. at 7, 126 S. Ct. 2437 (citations omitted). And as with the defense of duress, entrapment by estoppel enables a defendant to "avoid liability" where "coercive conditions ... negate[ ] a conclusion of guilt

even though the necessary *mens rea* was present." *Id.* at 6–7, 126 S. Ct. 2437.

Additionally, Honeycutt argues that the pattern instruction regarding entrapment by estoppel violates Due Process.[1] In particular, he focuses on the third and fourth prongs—the former, regarding reasonable reliance, and the latter concerning the unfairness of conviction for the crimes—although he has failed to show precisely how either factor is unconstitutionally burdensome.

Moreover, laying the third and fourth factors aside, Honeycutt was unable to prove that any federal agent affirmatively "announced that the charged criminal act was legal," much less that he reasonably relied on such an announcement. The agents did not tell him his distribution of iodine was legal; rather, they repeatedly warned him that his customers were buying iodine to manufacture methamphetamine.

In any event, given that his challenge to the district court's "refusal to give [his] specifically requested instruction is reviewed for abuse of discretion," and the "judgment may be reversed only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial," *Fencorp*, 675 F.3d at 943 (quoting *Micrel*, 486 F.3d at 881), his shot at this instruction falls well

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[1] He also asserts that the pattern instruction is an inaccurate and/or anomalous statement of the law. However, insofar as he indicates that the fourth factor is unique to the Sixth Circuit, he is mistaken. *See, e.g., United States v. Villafane-Jimenez*, 410 F.3d 74, 81 (1st Cir. 2005) (reciting essentially the same four-part test).

short of the mark. The pattern instruction about entrapment by estoppel did not render the instructions, as a whole, "confusing, misleading, or prejudicial," and the district court did not abuse its discretion by declining to modify that instruction.

E. Deliberate Indifference Instruction

Next, Honeycutt challenges the district court's deliberate-ignorance instruction. This instruction "is appropriately given when it addresses an issue reasonably raised by the evidence, i.e., when two predicates are met: '(1) the defendant claims a lack of guilty knowledge; and (2) the facts and evidence support an inference of deliberate ignorance.'" 6th Cir. Pattern Crim. Jury Instr. 2.09 Deliberate Ignorance Commentary (2013 ed.) (quoting *United States v. Mitchell*, 681 F.3d 867, 876 (6th Cir. 2012)). "We have repeatedly held that this instruction is an accurate statement of the law." *Mitchell*, 681 F.3d at 876 n.51.

Honeycutt denied any guilty knowledge, and the evidence offered at trial clearly justified a deliberate-ignorance instruction. Thus, the district court reasonably issued the instruction. *See id.* at 877 (noting that "[b]oth parties had the right to have the case submitted to the jury under instructions that would allow a full and fair evaluation of the evidence of record in light of the theories proffered by each side").

The deliberate-ignorance instruction did not encourage the jury to convict Honeycutt on less than beyond a reasonable doubt. *Id.* at 879. Moreover, as we have previously held, "at worst, any error in giving the instruction was harmless," since "there is

substantial evidence of actual knowledge," *Williams*, 612 F.3d at 508 (quoting *United States v. Mendoza–Medina*, 346 F.3d 121, 134 (5th Cir. 2003)), and given our conclusion that "a deliberate ignorance instruction that properly states the law is harmless error," *id.* (quoting *United States v. Rayborn*, 491 F.3d 513, 520 (6th Cir. 2007)).

F. Jury Finding of Iodine's Status as a List I Chemical

Honeycutt asserts that the specific listing of a chemical is an element of a § 841(c)(2) offense, because List I chemicals carry a higher statutory penalty; hence, he argues that the district court erred by not requiring the jury to determine whether iodine was, in fact, a List I chemical. Given that he did not raise this issue below, it is reviewable only for plain error.

As an initial matter, Honeycutt's 60–month sentence does not run afoul of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), since it did not exceed "the statutory maximum that would have applied even without the enhancing factor." *United States v. Osborne*, 673 F.3d 508, 512 (6th Cir .2012) (quoting *United States v. Burns*, 298 F.3d 523, 544 (6th Cir. 2002)).

As to whether iodine's status as a List I chemical constitutes an element of a § 841(c)(2) offense, Honeycutt correctly notes that § 841(c)(2) establishes a twenty-year maximum penalty for a violation "involving a List I chemical" and a ten-year maximum for all other violations, and that "any fact that increases the penalty for a crime ... must be submitted to a jury,

and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S. Ct. 2348. However, we need not decide whether he has identified a plain error, given that his substantial rights were clearly not affected. *See United States v. Stewart*, 306 F.3d 295, 317 (6th Cir. 2002) (finding it unnecessary to discuss the first three parts of the plain-error test because the fourth part had not been satisfied).

Even where a district court improperly withholds an element of an offense from the jury, however, the Supreme Court has held that the error is harmless if "a defendant did not, and apparently could not, bring forth facts contesting the omitted element." *Neder v. United States*, 527 U.S. 1, 6, 19, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).[2] Likewise, we have held that "where the evidence regarding the omitted element is undisputed, 'answering the question of whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.'" *United States v. Kuehne*, 547 F.3d 667, 681 (6th Cir. 2008) (quoting *Neder*, 527 U.S. at 19, 119 S. Ct. 1827). Here, each side offered evidence establishing that iodine is a List I chemical, and

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[2] Although *Neder* involved harmless error analysis under Rule 52(a), rather than plain error under Rule 52(b), that difference is immaterial because both standards require a showing that the error affected the defendant's substantial rights. *See United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993) (noting that the only difference between the two is that "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice" under the plain-error standard).

Honeycutt specifically elicited testimony that iodine has been thus classified since 2007.

Like *Neder*, this case is "one[] where a defendant did not, and apparently could not, bring forth facts contesting the omitted element," and the "omitted element is supported by uncontroverted evidence." 527 U.S. at 18–19, 119 S. Ct. 1827. Therefore, the absence of a jury finding regarding iodine's status as a List I chemical did not affect Honeycutt's substantial rights, and the district court did not plainly err by not requiring the jury to make such a finding.

IV. Vagueness Challenge

Honeycutt also asserts that § 841(c)(2) is unconstitutionally vague. We review challenges to the constitutionality of a statute de novo, and "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *United States v. Caseer*, 399 F.3d 828, 839 (6th Cir. 2005) (quoting *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995)). With a vagueness claim, a defendant "bears the burden of establishing that the statute is vague as applied to his particular case, not merely that the statute could be construed as vague in some hypothetical situation." *United States v. Kernell*, 667 F.3d 746, 750 (6th Cir. 2012) (quoting *United States v. Krumrei*, 258 F.3d 535, 537 (6th Cir. 2001)).

Honeycutt contends that, because list chemicals are not themselves controlled substances nor per se illegal, he may not be convicted without proof that he knew both that iodine is a listed chemical and that it appears

on List I. The district court rejected this argument, in particular because § 841(c) does not include a different knowledge requirement between List I and List II chemicals.

In support of his position, Honeycutt discusses at length our decision in *Caseer*, in which we held that, to satisfy the *mens rea* requirement of § 841(a) for an offense involving khat, the United States needed to prove the defendant knew that khat contained a controlled substance—since khat did not appear on the listed controlled substances schedules. 399 F.3d at 841. Confronting and rejecting the argument that the statute was unconstitutionally vague, we explained that "the more important aspect of vagueness doctrine 'is not actual notice, but ... the requirement that a legislature establish minimal guidelines to govern law enforcement,'" *id.* at 836 (quoting *Kolender v. Lawson*, 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983)), and concluded that the "scienter requirement" of the statute overcame "the threat to due process posed by the failure of the controlled substances schedules to identify that as a source of cathinone." *Id.* at 830.

Unlike khat, iodine is specifically listed in the Controlled Substances Act and the Federal Register as a list chemical. *See* 21 U.S.C. § 802(35); 72 Fed. Reg. 35920–01. Further, *Caseer's* concerns about a person of "ordinary intelligence" who "could unwittingly expose himself ... to criminal penalties," 399 F.3d at 839, does not apply to Honeycutt, as he clearly understood that iodine was a crucial ingredient for the

methamphetamine manufacturing process. Convictions under § 841(c)(2) require proof of "actual knowledge," which is an "unusually specific *mens rea* requirement," *United States v. Truong*, 425 F.3d 1282, 1288–91 (10th Cir. 2005), that serves to excuse the unwitting and convict the culpable. Accordingly, Honeycutt has failed to prove that the statute was unconstitutionally vague as applied.

V. Honeycutt's Sentencing

A. The Iodine Quantity Attributed to Honeycutt

At sentencing, the district court determined Honeycutt's Guideline range based upon a finding that his offenses involved "1.3 KG or more of Iodine" and a "List I chemical." Citing *United States v. Dado*, 759 F.3d 550, 570 (6th Cir. 2014), Honeycutt asserts that "drug quantity is an element of the offense in § 841," and argues that the jury should have made a specific finding regarding this element. However, *Dado* involved § 841(b)(1)(A), under which drug quantity affects the statutory minimum and maximum and, thus, requires a jury finding under *Apprendi*. In this case, the amount of iodine attributed to Honeycutt had no impact on the statutorily-authorized maximum penalty, so *Dado* is of no help to him. The district court was authorized to determine the iodine quantity for which Honeycutt would be held responsible, and its determination was not clearly erroneous. *See United States v. Samuels*, 308 F.3d 662, 670 (6th Cir. 2002) (reviewing drug quantity factual findings for clear error). Moreover, "drug quantity need only be

established by a preponderance of the evidence, and an estimate will suffice so long as it errs on the side of caution." *United States v. Anderson*, 526 F.3d 319, 326 (6th Cir. 2008) (citing *United States v. Davis*, 981 F.2d 906, 911 (6th Cir. 1992)).

In the instant case, the evidence strongly supported the district court's analysis of the iodine quantity attributable to Honeycutt. The store records indicated sales of more than 21,000 bottles of Polar Pure, each containing roughly eight grams of iodine crystals. Further, any quantity above 1.3 kilograms of iodine yields the same offense level of 30. Since the record establishes a quantity of iodine over 1.3 kilograms, the district court did not clearly err in its quantity determination.

B. Term in Excess of Statutory Maximum

Honeycutt asserts, and the Government concedes, that the district court's sentence of concurrent terms of 60 months' imprisonment for the three § 843(a)(6) violations exceeds the statutory maximum. Given that § 843(a)(6) does in fact establish a maximum penalty of four years' imprisonment, we will vacate the sentence on those counts. Even though Honeycutt's aggregate 60–month sentence remains unchanged in light of the § 841(c)(2) violations, we will remand this case to permit the district court to impose a sentence within the four-year maximum for the § 843(a)(6) counts.

VI. Forfeiture

In its cross-appeal, the Government asserts that the district court erred in refusing to order any forfeiture, given that the governing statute mandates the order of forfeiture if the requisite elements are satisfied. We review a district court's interpretation of federal forfeiture law de novo, *United States v. Hill*, 167 F.3d 1055, 1073 n. 13 (6th Cir. 1999), a district court's findings of fact for clear error, and the sufficiency of those facts de novo, *United States v. Jones*, 502 F.3d 388, 391 (6th Cir. 2007).

Section 853(a)(1) states that "[a]ny person convicted of a violation of this subchapter or subchapter II of this chapter ... shall forfeit ... any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation." Although the district court properly noted that "the statute mandates that [the district court] order forfeiture if the proceeds were directly or indirectly derived from the criminal enterprise," *see* 28 U.S.C. § 2461(c); 21 U.S.C. § 853(a), it declined to order forfeiture for a number of reasons. In particular, it found that (1) although "there was a criminal conspiracy being operated out of the Brainerd Army Store ... the Brainerd Army Store itself was [not] a criminal enterprise"; (2) "at least some of th[e] Polar Pure was sold for legal purposes.... [and] there is no evidence that would permit the Court to make a reasoned assessment of what percentage of that Polar Pure was due to illegal activity"; and (3) as "a salaried employee," the district court could not "say that

[Honeycutt] personally ... profited from th[e] illegal conspiracy." Of these reasons, it appears that the district court's decision was driven mostly by its determination that Honeycutt did not directly or indirectly reap the proceeds of the criminal enterprise.

The Sixth Circuit has not yet squarely addressed the issue of whether joint and several liability applies to forfeiture of proceeds under 21 U.S.C. § 853. Although under another statute we have previously reversed a district court's forfeiture order based on insufficient proof that a defendant had received any proceeds from fraudulent activity, observing that "[i]t is well-established that a defendant 'cannot be ordered to forfeit profits that he never received or possessed,'" *United States v. McLaughlin*, 565 Fed. Appx. 470, 475 (6th Cir. 2014) (quoting *United States v. Contorinis*, 692 F.3d 136, 145 (2d Cir. 2012)), we also recognized that "a defendant may 'forfeit proceeds received by others who participated jointly in the crime'—which is comparable to the possibility of forfeiting 'indirectly' obtained proceeds," *id.* (quoting *Contorinis*, 692 F.3d at 147). In fact, the lack of "an underlying conspiracy" in *McLaughlin* is one of the reasons that we distinguished that case from *United States v. Warshak*, 631 F.3d 266, 332 (6th Cir. 2010)—a case in which we invoked theories of corporate and accomplice liability to apply joint and several liability to forfeiture of revenue. 565 Fed. Appx. at 475. Here, the conspiracy factor distinguishes *McLaughlin* from the instant case.

A number of other circuits that have addressed this issue have concluded that § 853 mandates joint and

several liability among coconspirators for the proceeds of a drug conspiracy. *See, e.g., United States v. Roberts*, 660 F.3d 149, 165 (2d Cir. 2011), *cert. denied*, — U.S. ——, 132 S. Ct. 1640, 182 L.Ed.2d 239 (2012) ("In the case of a narcotics conspiracy [under § 853(a)(1)], this mandatory liability [regarding forfeiture] is joint and several among all conspirators."); *United States v. Van Nguyen*, 602 F.3d 886, 904 (8th Cir. 2010) (holding that under § 853, a defendant "may be held jointly and severally liable for all of the foreseeable proceeds of the conspiracy"); *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999) ("21 U.S.C. § 853(a)(1) imposes joint and several liability with respect to forfeiture."); *United States v. McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996) (concluding that § 853(a)(1) "is not limited to property that the defendant acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise"), *cert. denied*, 520 U.S. 1281, 117 S. Ct. 2468, 138 L.Ed.2d 223 (1997). On the other hand, at least one circuit has held that § 853 does not countenance joint and several liability. *See United States v. Cano–Flores*, 796 F.3d 83, 90–95 (D.C. Cir. 2015) (criticizing the circuits that have invoked *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L.Ed. 1489 (1946), to apply joint and several liability to § 853, and holding otherwise—based on the plain meaning of "obtained," the language of related Sentencing Guidelines passages, the rule of lenity, and the canon of constitutional avoidance). It is unnecessary to probe the reasoning of *Cano–Flores*,

however, given that we are precedentially bound by our own reasoning as laid down in the RICO forfeiture context. *See McHan*, 101 F.3d at 1042 ("We generally construe the drug and RICO forfeiture statutes similarly.").

In *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000), we determined that "co-conspirators in a RICO enterprise should be held jointly and severally liable for any proceeds of the conspiracy." *Id.* at 553. Echoing the rationale of sister circuits that had so concluded, we held that "[t]he government is not required to prove the specific portion of proceeds for which each defendant is responsible. Such a requirement would allow defendants 'to mask the allocation of the proceeds to avoid forfeiting them altogether.'" *Id.* (quoting *United States v. Simmons*, 154 F.3d 765, 769–70 (8th Cir. 1998) (quoting *United States v. Caporale*, 806 F.2d 1487, 1508 (11th Cir. 1986))).

Although *Corrado* did not specifically concern § 853, the relevant language and structure of the two statute's forfeiture provisions are virtually identical: both contain the mandatory "shall forfeit" phrasing; both demand the forfeiture of "any property constituting, or derived from, any proceeds [that] the person obtained, directly or indirectly," as result of the violation; and both dictate that their provisions "shall be liberally construed to effectuate [their] purposes." *Compare* 21 U.S.C. § 853(a), (a)(1), (*o*), *with* 18 U.S.C. § 1963(a), (a)(3), *and* 18 U.S.C. § 3731. We find that our holding and rationale in *Corrado* carries equal weight in the § 853 context. Moreover, neither the

district court's above-mentioned concerns nor Honeycutt's arguments militate otherwise. *See Warshak*, 631 F.3d at 332 ("[T]he argument that certain sales were legitimate gains no traction. Any money generated through these potentially legitimate sales is nonetheless subject to forfeiture, as the sales all resulted 'directly or indirectly' from [the] conspiracy."); *United States v. Darji*, 609 Fed. Appx. 320, 321–22 (6th Cir. 2015) (upholding a district court's application of joint and several liability for forfeiture of proceeds, even though a defendant "received only a reasonable salary"). And finally, and most importantly, "[e]ven if we were persuaded by [Honeycutt]'s argument and [the district court]'s rationale, we are bound by the [*Corrado*] decision," as "[i]t is firmly established that one panel of this court cannot overturn a decision of another panel; only the court sitting en banc can overturn such a decision." *United States v. Lanier*, 201 F.3d 842, 846 (6th Cir. 2000) (citing *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996)). [3] Accordingly, we conclude that the district court erred in declining to order forfeiture in this case.

CONCLUSION

For the reasons stated above, we **AFFIRM** Honeycutt's § 841(c)(2) convictions, **VACATE** Honeycutt's sentences on the § 843(a)(6) convictions,

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[3] It is also worth noting that the D.C. Circuit's criticisms in *Cano-Flores*, 796 F.3d at 90–95—if valid—would apply with equal force to both the RICO and § 853 forfeiture provisions. And so, again, we would need to overrule *Corrado* if we were to follow *Cano-Flores*.

REVERSE the district court's determination that forfeiture is not warranted, and **REMAND** the case to permit the district court to resentence Honeycutt on the § 843(a)(6) convictions and reconsider a forfeiture order consistent with this opinion.

CONCURRENCE

KAREN NELSON MOORE, Circuit Judge, concurring in the judgment.

I agree that Terry Honeycutt's convictions and his sentence should be affirmed, except insofar as we must vacate the sentences imposed for his § 843(a)(6) convictions as exceeding the applicable statutory maximum. I also agree that we must reverse the district court's refusal to order forfeiture, bound as we are by a decision of a prior panel of this court that a statute involving identical language to 21 U.S.C. § 853(a) allows the imposition of joint-and-several forfeiture liability. I write to emphasize why that prior panel was likely incorrect, and to suggest that the full court consider the issue en banc.

In declining to order forfeiture, the district court focused quite reasonably on the dearth of evidence regarding Honeycutt's financial motivations for participating in this conspiracy. Honeycutt's lack of ownership interest in the store and the absence of evidence describing what, if anything, Honeycutt himself gained from the sales of Polar Pure gave the

district court pause. This concern would seem to flow directly from the forfeiture statute the district court was tasked with applying, which provides: "Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. § 853(a). The government "must prove forfeiture by a preponderance of the evidence," *United States v. Warshak*, 631 F.3d 266, 331 (6th Cir. 2010) (quoting *United States v. Jones*, 502 F.3d 388, 391 (6th Cir. 2007)), so a lack of evidence suggesting that Honeycutt "obtained" anything would seem to be problematic.

As the majority explains, this seemingly clear statute has been interpreted otherwise. Although no published Sixth Circuit authority addresses the issue under 21 U.S.C. § 853(a), the forfeiture provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1963(a), contains *identical* language, and both provisions were enacted as part of the same law. *See* Comprehensive Forfeiture Act of 1984 §§ 302–303, Pub. L. No. 98–473, 98 Stat. 2040–45 (1984). We previously interpreted that provision of RICO to allow for the imposition of joint-and-several forfeiture liability, *United States v. Corrado*, 227 F.3d 543, 553 (6th Cir. 2000), and have since indicated in unpublished decisions that the same applies to § 853(a), *see, e.g.*, *United States v. Darji*, 609 F. App'x 320, 331–32 (6th Cir. 2015); *United States v. Logan*, 542 F.

App'x 484, 498–99 (6th Cir. 2013). Because I see no principled basis for distinguishing the two statutes, I agree with the majority that we are bound to follow *Corrado* and hold that joint-and-several liability is available under 21 U.S.C. § 853(a).

As the district court's concerns demonstrate, this holding seems to be contrary to the statute, which reaches only that property that a defendant "obtained." Although many circuits have held that § 853(a) allows for joint-and-several liability, Maj. Op. at 379–80, and many others have held the same under § 1963(a),[1] there has been surprisingly little explanation of the textual basis for such a rule. In *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996), the court determined that the statute's use of the phrase "obtained ... indirectly" means that it applies to "all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise," *id.* at 1043, but joint-and-several liability reaches further than that. It would hold a defendant responsible for property he never had, so long as a co-defendant obtained the property. The same argument was made in a decision of the U.S. District

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[1] *See United States v. Edwards*, 303 F.3d 606, 643 (5th Cir. 2002), *cert. denied*, 537 U.S. 1192, 123 S. Ct. 1272, 154 L.Ed.2d 1025 (2003); *United States v. Simmons*, 154 F.3d 765, 769–70 (8th Cir. 1998); *United States v. Hurley*, 63 F.3d 1, 22 (1st Cir. 1995), *cert. denied*, 517 U.S. 1105, 116 S. Ct. 1322, 134 L.Ed.2d 474 (1996); *United States v. Masters*, 924 F.2d 1362, 1369 (7th Cir.), *cert. denied*, 500 U.S. 919, 111 S. Ct. 2019, 114 L.Ed.2d 105 (1991); *United States v. Caporale*, 806 F.2d 1487, 1506–08 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021, 107 S. Ct. 3265, 97 L.Ed.2d 763 (1987).

Court for the Southern District of New York—which the Second Circuit adopted on appeal—but that decision also conflated property obtained indirectly by a defendant through a co-conspirator, with property obtained by a co-conspirator alone. *See United States v. Benevento*, 663 F.Supp. 1115, 1118 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 129 (2d Cir. 1988). Other decisions, including our decision in *Corrado*, largely gloss over the statutory text.

Although no contrary authority existed when we decided *Corrado*, the D.C. Circuit has recently questioned the circuit consensus, emphasizing the plain language of § 853(a). *See United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015). The statute, the D.C. Circuit held, "appears, on its face, to embrace only property that a defendant has 'obtained,'" and using the term "indirectly" to impose co-conspirator liability "reads the word 'obtained' out of the statute." *Id.* at 91. Simply put, "[i]n ordinary English a person cannot be said to have 'obtained' an item of property merely because *someone else* (even someone else in cahoots with the defendant) foreseeably obtained it." *Id.* The D.C. Circuit's textual argument is more thorough than any conducted by the many circuits that hold that joint-and-several liability is available, and it persuades me that we should reconsider *Corrado*.

I find that the other reasons given by courts for applying joint-and-several liability are likely to be equally inadequate. Many rely on a *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed.

1489 (1946), theory that a conspirator is liable for the reasonably foreseeable actions of co-conspirators, *Simmons*, 154 F.3d at 770; *McHan*, 101 F.3d at 1043; *Hurley*, 63 F.3d at 22; *Caporale*, 806 F.2d at 1508, but the *Pinkerton* doctrine "speaks only to a defendant's substantive liability—not to the consequences of such liability," *Cano-Flores*, 796 F.3d at 94, making it an especially thin basis for overruling the statute's plain text. Nor is the general rule that §§ 853(a) and 1963(a) should be construed broadly, *United States v. Russello*, 464 U.S. 16, 26–29, 104 S. Ct. 296, 78 L. Ed.2d 17 (1983); 21 U.S.C. § 853(*o*), a sufficient reason to override their plain language, contrary to the suggestions of *McHan*, 101 F.3d at 1043, and *Caporale*, 806 F.2d at 1507. In any event, "even if the statute were ambiguous in the sense of *permitting* the government's construction, '[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.'" *Cano-Flores*, 796 F.3d at 93–94 (quoting *United States v. Santos*, 553 U.S. 507, 514, 128 S. Ct. 2020, 170 L. Ed.2d 912 (2008)).

I am sensitive to concerns that precluding joint-and-several liability may frustrate the government's ability to collect illicit proceeds, either due to the Eighth Circuit's concern that it might "allow defendants to mask the allocation of the proceeds," *Simmons*, 154 F.3d at 770 (internal quotation marks omitted), or the First Circuit's warning that "[i]f conclusive weight were given to who physically handled the money, a low-level courier or money counter could be liable for vast sums, while other higher level conspirators could easily escape responsibility,"

Hurley, 63 F.3d at 22, but I am not convinced that the absence of joint-and-several liability would frustrate collections as much as these decisions anticipate. Moreover, the First Circuit's concern ignores the ways in which property may be "indirectly obtained" by a higher-level conspirator, who may not possess it, but who ultimately controls it and reaps the financial benefits of the illegal operation. *See Cano–Flores*, 796 F.3d at 92. In any event, in the absence of a statutory basis for requiring the imposition of joint-and-several liability, it would seem to be Congress's job to provide an expanded mechanism for obtaining forfeiture.

In light of my concerns regarding the correctness of our decision in *Corrado*, I believe en banc consideration is appropriate to consider whether *Corrado* should be overturned.

Appendix B

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

AT CHATTANOOGA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
-versus-	:	CR-1-12-144
	:	
TERRY MICHAEL HONEYCUTT,	:	
	:	
Defendant.	:	

Chattanooga, Tennessee
June 16, 2014

BEFORE:THE HONORABLE HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JAY WOODS,
Assistant United States Attorney
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

CHRISTOPHER A. TOWNLEY, of
Townley & Lindsay
1406 South Crest Road
P.O. Box 278
Rossville, Georgia 30741

JUDGMENT PROCEEDINGS
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THE COURT: The clerk will call the next case.

THE CLERK: United States of America versus Terry Michael Honeycutt. Case No. is 1:12-CR-144.

THE COURT: All right. Yeah. Why don't you go over there, Mr. Honeycutt.

Counsel, I continued this hearing from a few weeks ago. And my recollection is I imposed a sentence and considered everything, correct me if I'm wrong, if I need to reread this, the only thing that I didn't rule on was the forfeiture request by the government.

Is that accurate, Mr. Woods?

MR. WOODS: Yes, sir. That is correct.

THE COURT: Is that accurate, Mr. Townley?

MR. TOWNLEY: It is, Your Honor.

THE COURT: All right, And I ordered counsel to submit briefs, which you did, and I have read your briefs. And thank you very much. They're very informative. I think they outline the case law that's out there regarding forfeiture. Is there anything else either of you want to — I've read your briefs. I've read some of the cases. I think I understand the issues. And is there anything you want to add before I rule on that?

MR. WOODS: I have nothing further, Judge.

THE COURT: All right. Having read all of the cases, I am going to decline to order forfeiture in this case. And let me explain why based upon the cases. While many of the cases were very informative to the

Court, I found that none of the cases that I reviewed were on all fours with this case. And let me go into some of my reasoning in making this decision.

First of all, one of the cases that I found to be most informative was *United States versus Warshak*, which is reported at 631 F.3d 266 from the Sixth Circuit in 2010. I find *Warshak* to be, again, instructive, but I find this case to be somewhat distinguishable from *Warshak* in this regard. Having heard all of the evidence, I believe that the Sixth Circuit in *Warshak* found that pretty much the entire enterprise in which the defendant was engaged in to be a criminal enterprise. And that the defendant made some efforts to show that there were some legitimate legal sales involved in that enterprise, but, I think that the Court described it, I can't remember, as cosmetic, I can't remember. The Court was not convinced that the entire enterprise was not a criminal enterprise.

Having listened to all of the evidence in this case, I don't believe that — I find that the Brainerd Army Store itself was not a criminal enterprise, either before they began these very large sales of Polar Pure, and I find that while, clearly, it has been found by a jury, and by Mr. Honeycutt's brother pleading guilty, that there was a criminal conspiracy [4] being operated out of the Brainerd Army Store, I do not find that the Brainerd Army Store itself was a criminal enterprise. That is sort of reflected in the fact that in this case that the conspiracy to which Mr. Honeycutt's brother pled guilty and to which Mr. Honeycutt, Terry Honeycutt,

stands convicted was between those two individuals and not the, and not the store.

The other factors that I find compelling here, which is shared by some of the other cases, is the government really hasn't shown with any — what the government has shown is the total amount of sales of Polar Pure that occurred over the course of the conspiracy. But, I mean, everybody concedes that Polar Pure itself is a product which does have legal uses. And there were sales of Polar Pure before this massive build-up. Now, I think that the jury's verdict is reflective that a large proportion of that Polar Pure that was sold during the period of the conspiracy was sold with knowledge or reasonable cause to believe that it was going to be used for illegal purposes. However, the fact remains that it's probably undoubtedly true that some of the Polar Pure was being used for legal purposes.

Now, Mr. Honeycutt's brother, of course, part of his guilty plea, I believe, pled guilty to and has paid 200,000 in forfeiture. Is that correct, Mr. Woods?

MR. WOODS: That is correct, Judge.

[5] THE COURT: So, that remains for all of the Polar Pure that was sold during this period just short of 70,000, about 69,000. Is that accurate, Mr. Woods?

MR. WOODS: $69,751.

THE COURT: And given that the Court concludes that at least some of that Polar Pure was sold for legal purposes, there is simply no evidence before me to suggest that every single bottle of Polar Pure was used for illegal purposes. And the lacking of that

evidence and having found that Brainerd Army Store itself was not a criminal enterprise, you know, I'm left, the Court is left with having to say either all of the remaining Polar Pure was for a criminal enterprise, or none of it, because there is no reasoned, there is no evidence that would permit the Court to make a reasoned assessment of what percentage of that Polar Pure was due to illegal activity.

Now, I'm cognizant that the statute mandates that I do order forfeiture if the proceeds were directly or indirectly derived from the criminal enterprise. And while I do — the jury has found, and I, obviously, so find that Mr. Terry Honeycutt was involved in a criminal conspiracy with Mr. Tony Honeycutt, it's difficult for me to say that Mr. Terry Honeycutt personally, you know, profited from that illegal conspiracy. And part of what I'm basing my finding in that regard on is his lack of an ownership interest in the [6] Brainerd Army Store. I mean, he was a salaried employee. It is not clear to me, and I think that, you know, the government has conceded, I mean, what Mr. Honeycutt's financial motivations may have been, are just not clear in this case. And that further adds to the Court's difficulty in coming up with a reasoned determination of a monetary amount to order forfeiture on.

So, having said all of that, those are the principal factors that the Court has considered. Again, I've read your briefs. And I thank you for the briefs. I've read the cases. I think that this is a relatively close case, but given all of facts and circumstances of

the case, as I see it, I'm going to decline to order forfeiture against Mr. Terry Honeycutt in this case.

All right. Now, counsel, are we fairly confident, because if I didn't read this sentence before, I need to do it again. Do we — should I do that out of an abundance of caution or — has it been read? Do you agree, Mr. Townley, it's been read?

MR. TOWNLEY: Yes, sir.

THE COURT: Do you agree, Mr. Woods?

MR. TOWNLEY: We're aware of the sentence, yes, sir.

MR. WOODS: Judge, my recollection is that the Court has imposed sentence, that only the money judgment was left to be determined.

[7] THE COURT: You know what I think I'm going to do, just so we don't have to do this again, I think I'm going to reread the sentence. There is going to be no forfeiture. All right. Let me reread the sentence.

The Court has considered the nature and circumstances of the offense, the history and characteristics of the defendant, and the advisory guideline range, as well as the other factors listed in Title 18, United States Code, Section 3553(a).

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, Terry Michael Honeycutt, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 60 months on each of Counts 1, 5, 6, 8, 9, 12 and 13, to be

served concurrently. Counts 2, 10, 11 and 14 have been merged with Counts 1, 5, 6 and 13.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of two years. This consists of terms of two years on each of Counts 1, 5, 6, 8, 9, 12 and 13, all such terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall not [8] commit another federal, state, or local crime, shall comply with the standard conditions that have been adopted by this Court in Local Rule 83.10, and shall not illegally possess a controlled substance.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA, as directed.

In addition, the defendant shall comply with the following special condition:

The defendant shall submit to a search of his property, real or personal, residence, place of business or employment, and/or vehicles at the request of the United States Probation Officer. The defendant shall permit confiscation and/or disposal of any material considered contraband or any other item that may be

deemed to have evidentiary value related to violations of supervision.

It's further ordered that the defendant shall pay to the United States a special assessment of $700, pursuant to Title 18, United States Code, Section 3013, which shall be due immediately.

The Court finds that the defendant does not have the ability to pay a fine, and the Court will waive the fine in this case.

All documents sealed in this case are now ordered to [9] be unsealed with the exception of the presentence investigation report unless counsel has reasons that they should not be.

Does either party have any objections to the sentence just pronounced that have not previously been raised. Mr. Townley?

MR. TOWNLEY: Not other than those raised previously.

THE COURT: All right. Mr. Woods?

MR. WOODS: That's correct, Judge. We stand on the position detailed in our papers filed with the Court.

THE COURT: All right. Okay. All right.

All right. Now, Mr. Honeycutt, I think I explained this to you before, but if I didn't, I'm going to explain it to you again. You do have the legal right to appeal this sentence, as well as your conviction. If you want to do that, you must file what's known as a notice of appeal within 14 days after the entry of the judgment

in your case. The judgment is simply a formal, legal document that outlines all of the sentence that I've imposed back a few weeks ago and today. And Mr. Townley can tell you when it's filed on the Court's record thereby triggering your 14 days.

All right. There is a fee associated with filing a notice of appeal. If you can't afford to pay that fee, you may file an application for what's known as in forma pauperis [10] or IFP status which, if granted, will have the affect of reducing or eliminating that fee. Mr. Townley can help you with that as well. If for any reason Mr. Townley doesn't help you, which I think is highly unlikely, but if he doesn't, you can contact the Clerk of the Court, and the Clerk of the Court will provide you with the necessary documents for both the notice of appeal and the IFP application.

Do you understand your appeal rights, Mr. Honeycutt?

THE DEFENDANT: Yes, sir.

THE COURT: All right. All right. Anything else on behalf of Mr. Honeycutt this morning, Mr. Townley?

MR. TOWNLEY: No, sir.

THE COURT: Anything else from the government, Mr. Woods?

MR. WOODS: No, Judge.

MR. TOWNLEY: And, Your Honor, I say that, may I speak with Mr. Honeycutt for just a second?

THE COURT: Sure.

(Brief pause.)

MR. TOWNLEY: No, sir.

THE COURT: All right. Good luck to you, Mr. Honeycutt.

THE DEFENDANT: Thank you, sir.

THE COURT: Court will be in recess until 2:00 p.m.

END OF JUDGMENT PROCEEDINGS

[11] I, Shannan Andrews, do hereby certify that I reported in machine shorthand the proceedings in the above-styled cause held June 16, 2014, and that this transcript is an accurate record of said proceedings.

s/Shannan Andrews
Shannan Andrews
Official Court Reporter

Appendix C

Nos. 14-5790/5850

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee/Cross-Appellant,	)	
	)	
v.	)	ORDER
	)	
TERRY MICHAEL HONEYCUTT,	)	
	)	
Defendant-Appellant/Cross-Appellee.)		
	)	

FILED May 31, 2016

BEFORE: SILER, MOORE, and GIBBONS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/s Deborah S. Hunt
Deborah S. Hunt, Clerk

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT of TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	**1:12-CR-144**
v.	)	
	)	**Judge Mattice**
TERRY MICHAEL HONEYCUTT	)	

RESPONSE TO DEFENDANT'S MONEY JUDGMENT FORFEITURE MEMORANDUM

COMES NOW the United States of America by and through William C. Killian, United States Attorney for the Eastern District of Tennessee, and Jay Woods, Assistant United States Attorney, and responds to the defendant's Money Judgment Forfeiture Memorandum (doc. 107).

Following a conviction for any offense that authorizes forfeiture, the Court must order forfeiture. 28 U.S.C. § 2461(c) (providing that "the court *shall* order the forfeiture of the property as part of the sentence" (emphasis added)). In requiring forfeiture in certain criminal cases, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory." *United States v. Monsanto*, 491 U.S. 600, 606 (1989). Where the United States has included a notice of forfeiture in the indictment, as required by Rule 32.2(a) of the Federal Rules of

Criminal Procedure, and has then established the required nexus to the offense, the Court has no discretion; it is required to order the forfeiture of the property, and its refusal to do so is subject to appeal. *See, e.g., United States v. Carpenter*, 317 F.3d 618, 626 (6th Cir. 2003) (holding that because criminal forfeiture is mandatory, the court must order the forfeiture of the property used to commit the offense in its entirety, even if the defendant used only part of it for that purpose; the only limitation is the Excessive Fines Clause of the Eighth Amendment); *aff'd en banc*, 360 F.3d 591 (6th Cir. 2004); *United States v. Corrado*, 227 F.3d 543, 549, 552 (6th Cir. 2000) (explaining that forfeiture is a mandatory aspect of the sentence; district court erred in refusing to order forfeiture of "sufficiently quantifiable" proceeds of RICO offense and further holding that because forfeiture is mandatory, refusing to order forfeiture judgment constitutes a sentence imposed in violation of law for which appeal is authorized).

The defendant first argues that the Court should not impose a money judgment (Doc. 107, Defendant's Money Judgment Forfeiture Memorandum ("Def. Memo") at 1.) Clearly, as detailed above, this argument must fail. Forfeiture is a mandatory consequence of the defendant's convictions.

The defendant next asserts that the United States failed to present evidence at trial to support the amount of forfeiture, deeming his own business records "an unsupported proclamation." (*Id.* at 3.) The defendant further contends that some of his sales of

iodine were legitimate (*id.*), an argument he advanced—but did not support with evidence—at trial. In reality, the United States did present evidence sufficient to support the forfeiture amount alleged in the indictment. At trial, the United States presented testimony that law enforcement officers executed a search warrant at the defendant's business and, on that day, the defendant himself provided electronic copies of four "Top Items" reports to the officers. The United States presented these four reports as exhibits, and the Court accepted them as evidence without objection from the defendant. Each Top Item report supplied the same information for an item of inventory: a lookup code and description, the quantity sold, and the sales and profit generated, and each report represented a different calendar year. The reports were ordered based on the sales of each item, with the highest grossing item at the top of each report. The four reports together covered the entire scope of the defendant's conspiracy. A review of these exhibits details the profits generated from the sales of iodine, in the form of Polar Pure:

Exhibit Number	Year	Sales	Profit
26	2007—partial	$ 29.68	$ 15.88
27	2008	$ 53,545.77	$ 35,263.43
28	2009	$251,724.01	$170,733.41
29	2010—partial	$ 94,187.71	$ 63,739.26
Total	[redacted]	[redacted]	$269,751.98

In the indictment, the United States alleged a money judgment of $269,751.98 against the profit from iodine sales. (Doc. 74, Second Superseding

Indictment at 4.) At trial, the United States established through detailed proof the total profit from iodine sales as $269,751.98.

While the defendant correct noted that the jury acquitted him on three counts (doc. 107, Def. Memo at 3), he failed to acknowledge that the jury convicted him of unlawfully selling iodine on every date alleged in the indictment (doc. 96, Verdict Fonn). In other words, the jury found the defendant guilty of a substantive unlawful act on every date alleged in the indictment. The defendant's claim that the three acquittals somehow made his sales on those three days legitimate, when the jury convicted him of the same substantive act on an alternate theory, does not support his otherwise unsubstantiated claim that his iodine sales were lawful.

Next, the defendant argues that his role as employee and his lack of ownership or controlling interest in the Brainerd Army Store, from where he unlawfully sold iodine, should limit the Court's money judgment against him. (Doc. 107, Def. Memo at 3-4.) However, the defendant's argument misconstrues the plain language of 21 U.S.C. § 853. There, Congress provided that, upon a conviction that authorizes forfeiture, the defendant shall forfeit to the United States "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. § 853(a)(1).

As demonstrated at trial, the defendant was directly involved in deriving proceeds from the sale of iodine. His responsibilities at the Brainerd Army Store included managing the inventory and data entry. (Doc. 104, Tr. Defendant's Testimony at 41, 43.) Consequently, the defendant was familiar with the more than 21,000 bottles of iodine sold in two and one-half years, as he stocked and restocked those items throughout the conspiracy, and he knew that the Store was selling "an awful lot of' iodine; furthermore, the defendant sometimes worked at the cash register and made the actual sales of iodine. *(Id.* at 47-49.) Thus, the defendant was directly involved in obtaining the proceeds for the sale of iodine, and a money judgment is appropriate. The fact that the defendant retained only a small percentage of the proceeds does not limit the Court's enforcement of a money judgment up to the full amount sought by the United States. The defendant's argument must yield to the strong language of 28 U.S.C. § 2461(c) and the clear intent of 21 U.S.C. § 853.

Finally, the defendant claims that any money judgment against him will constitute an excessive punishment in violation of the Eighth Amendment. (Doc. 107, Def. Memo at 4-5.) Forfeiture is unconstitutionally excessive only if it is "grossly disproportional to the gravity of the defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *United States v. Droganes*, 728 F.3d 580 (6th Cir. 2013) (explaining "[w]here the government seeks to punish the defendant by an *in personam* criminal forfeiture . . . the contours of the

defendant's Eighth Amendment rights are defined by the 'proportionality test'" outlined in *Bajakajian).* The test articulated in *Bajakajian* established four factors for the Court to consider in determining whether a forfeiture violates the Excessive Fines Clause: (a) "the essence of the crime" of the [defendant] and its relation to other criminal activity, (b) whether the [defendant] fit into the class of persons for whom the statute was principally designed, (c) the maximum sentence and fine that could have been imposed, and (d) the nature of the harm caused by the [defendant's] conduct. *United States v. Collado*, 348 F.3d 323, 328 (2d Cir. 2003) *(per curiam)* (citing *Bajakajian*, 524 U.S. at 337-39.

Applying the four factors of *Bajakajian* to the defendant's case clearly supports a money judgment. First, the essence of the crime—unlawful distribution of iodine—was related to the manufacture and distribution of methamphetamine. Next, the defendant and his co-defendant sought to profit from the sale of iodine, placing them squarely in a class subject to a money judgment. Third, the defendant is subject to a maximum fine up to $250,000.00; the net punishment of a money judgment would be approximately $69,751.98, well below the maximum fine and the defendant's net worth. Finally, the United States has detailed the harm caused by the defendant's offense in a Sentencing Memorandum filed April 14, 2014. *(See* doc. 108, Sentencing Memorandum at 8-11.) When assessing whether a money judgment exceeds the bounds of

the Eighth Amendment's limitations, the "'touchstone of the constitutional inquiry. . . is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.'" *United States v. Malewicka*, 664 F.3d 1099, 1103 (7th Cir. 2011). The defendant has never acknowledged the harm he caused society or the danger consequent of his distribution of iodine. A guideline range sentence along with a money judgment would address the gravity of the defendant's offense with a proportional sentence.

WHEREFORE, the Court should impose a money judgment against the defendant for $269,751.98.

Respectfully submitted,

WILLIAM C. KILLIAN
United States Attorney

By: /s/ Jay Woods
Jay Woods
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/Jay Woods
Jay Woods
Assistant United States Attorney

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT of TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	1:12-CR-144
v.	)	
	)	Judge Mattice
TERRY MICHAEL HONEYCUTT	)	

MEMORANDUM BY THE UNITED STATES ON ISSUES RELATED TO DEFENDANT'S MONEY JUDGMENT

COMES NOW the United States of America by and through William C. Killian, United States Attorney for the Eastern District of Tennessee, and Jay Woods, Assistant United States Attorney, and offers this memorandum to assist the Court in setting an appropriate money judgment. The defendant stands convicted of conspiring to distribute a list chemical to methamphetamine manufacturers and multiple substantive acts related to the conspiracy. At the defendant's sentencing hearing on May 12, 2014, the Court questioned how it could correctly calculate the amount of the money judgment when, in theory, some of the list chemical transactions could have been legal—though the defendant presented no proof of even one legal sale—and neither party could show conclusively the

exact profit generated from unlawful sales of the list chemical. In addition, the United States brought *United States v. McLaughlin*, decided by the Sixth Circuit on the Friday prior to the defendant's Monday sentencing hearing, to the Court's and the defendant's attention. The Court ordered memoranda from both parties on the calculation of the money judgment and the relevance of the *McLaughlin* decision.

As noted previously, upon a conviction for any offense that authorizes forfeiture, the Court must order forfeiture. 28 U.S.C. § 2461(c) (providing that "the court *shall* order the forfeiture of the property as part of the sentence" (emphasis added)). The forfeiture statute, 21 U.S.C. § 853(a)(1), requires the forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly" from criminal conduct. Though the Sixth Circuit has not determined whether joint and several liability applies to this mandatory obligation, "the circuits that have addressed the issue have concluded that the statute mandates joint and several liability among co-conspirators for the proceeds of a drug conspiracy." *United States v. Logan*, 542 F. App'x 484, 498 (6th Cir. 2013) (listing cases holding, *e.g.*, "'In the case of a narcotics conspiracy, this mandatory liability is joint and several among all conspirators.'"). Furthermore, the Sixth Circuit has not previously addressed whether "the amount of proceeds attributable to a defendant" are limited "to those reasonably foreseeable to that defendant." *Id.* at

499. Nevertheless, "most circuits" have. *Id.* (listing cases). In *Logan*, the defendant did not dispute the district court's use of this foreseeability test but argued that the proceeds of the conspiracy were not foreseeable to him. *Id.* The Sixth Circuit determined that the defendant knew that his coconspirator was a drug dealer and that the drug dealer was using the defendant to distribute controlled substances. *Id.* Therefore, the Sixth Circuit determined that the total drug quantity and, thus, the total proceeds were foreseeable to the defendant and that liability for a forfeiture based on the proceeds from the total drug quantity was appropriate. *Id.*

On this issue, *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) is instructive, though the United States pursued the money judgment in *Warshak* under Title 18. Warshak was the primary player in a massive fraud and money-laundering scheme. *Id.* at 274-282. Following Warshak's conviction, the United States obtained money judgments totaling more than half a billion dollars. *Id.* at 281. At trial and on appeal, Warshak argued that the United States had failed to prove that the entirety of his revenue constituted the proceeds of fraud. *Id.* at 281-282, 331-332. Specifically, Warshak argued that his ameliorative efforts, his indirect retail sales, and the majority of his product line—which was lawful—provided a legitimacy to his revenue and that the district court erred in accepting the argument that all of the revenue resulted from fraud. *Id.* at

331-332. Citing 18 U.S.C. § 982(a)(2)[1], the Sixth Circuit held that the ameliorative efforts were "cosmetic" and "ineffective" and that, "[m]oreover, the argument that certain sales were legitimate gains no traction. Any money generated through these potentially legitimate sales is nonetheless subject to forfeiture, as the sales all resulted 'directly or indirectly' from a conspiracy to commit fraud." *Id.* at 332. Thus, the Sixth Circuit upheld the money judgments, "including money generated through supposedly legitimate transactions." *Id.* at 333.

The United States must prove forfeiture by a preponderance of the evidence. *United States v. Jones*, 502 F.3d 388, 391 (6th Cir. 2007). Admittedly, the defendant did not have a controlling interest in the store selling the listed chemical and did not stand to benefit personally from the illegal sales. However, the defendant's coconspirator did have an ownership role and did stand to benefit personally from the $269,751.98 in profit from the sales of the listed chemical. Because the jury convicted the defendant of a conspiracy with the defendant's

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[1] 18 U.S.C. § 982(a)(2) reads, " . . . shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation." Likewise, 21 U.S.C. § 853, which applies here, reads, " . . . shall forfeit to the United States, irrespective of any provision of State law—(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." In other words, the language of the two forfeiture statutes is almost identical.

coconspirator, the Court should hold the defendant jointly liable for the profit from the illegal sales. As the employee responsible for ordering products and inventory (doc. 104, Tr. Defendant's Testimony at 41, 43) and because the defendant had knowledge of both the use of the listed chemical in the manufacture of methamphetamine and law enforcement had warned the defendant, the sales and proceeds from those sales were reasonably foreseeable. Finally, consistent with *Warshak*, all of the list chemical sales—including the theoretical lawful sales—generated proceeds subject to forfeiture.

The Friday before the defendant's sentencing hearing, the Sixth Circuit decided *United States v. McLaughlin*, No. 13-5693, 2014 U.S. App. LEXIS 8794 (6th Cir. May 9, 2014). *McLaughlin* reversed a forfeiture award because the United States could not show that McLaughlin, personally, benefitted from the unlawful funds. *Id.* at *8. However, *McLaughlin* specifically distinguished *Warshak* because *McLaughlin* did not involve a conspiracy while the forfeiture in *Warshak* was "was based on an underlying conspiracy between the corporation, its owner, and its main officers" implicating "theories of corporate and accomplice liability which justified the forfeiture order" whereas McLaughlin alone committed fraud. *Id.* at *19.

WHEREFORE, a money judgment of $69,751.98 is appropriate for the defendant.

Respectfully submitted,

WILLIAM C. KILLIAN
United States Attorney

By: s/ Jay Woods
Jay Woods
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/ Jay Woods
Jay Woods
Assistant United States Attorney

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT of TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	**1:12-cr-144**
v.	)	
	)	**Judge Mattice**
TERRY MICHAEL HONEYCUTT	)	**Magistrate Judge Carter**

SECOND SUPERSEDING INDICTMENT

Count One

The Grand Jury charges that from in or about April, 2008, and continuing to in or about November, 2010, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, and others known and unknown to the Grand Jury, did combine, conspire, confederate, and agree to knowingly, intentionally, and without authority possess and distribute iodine, a Listed chemical, knowing and having reasonable cause to believe that the listed chemical would be used to manufacture methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 846 and 841(c).

Count Two

The Grand Jury further charges that from in or about April, 2008, and continuing to in or about November, 2010, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, and others known and unknown to the Grand Jury, did combine, conspire, confederate, and agree to knowingly, intentionally, and without authority possess chemicals, products, and materials which may be used to manufacture methamphetamine, a Schedule II controlled substance, knowing, intending, and having reasonable cause to believe that the chemicals, products, and materials would be used to manufacture methamphetamine, in violation of Title 21, United States Code, Sections 846 and 843(a)(6).

Counts Three through Seven

The Grand Jury further charges that on or about the dates listed below, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, aided and abetted by others, did knowingly and intentionally distribute iodine, a Listed chemical, knowing and having reasonable cause to believe that it would be used to manufacture methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(c) and Title 18, United States Code, Section 2:

Count	Date
3	October 26, 2009
4	November 2, 2009
5	November 6, 2009
6	November 18, 2009
7	November 8, 2010

Counts Eight through Twelve

The Grand Jury further charges that on or about the dates listed below, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, aided and abetted by others, did knowingly, intentionally, and without authority possess chemicals, products, and materials which may be used to manufacture methamphetamine, a Schedule II controlled substance, knowing, intending, and having reasonable cause to believe that the chemicals, products, and materials would be used to manufacture methamphetamine, in violation of Title 21, United States Code, Sections 843(a)(6) and Title 18, United States Code, Section 2:

Count	Date
8	October 26, 2009
9	November 2, 2009

10	November 6, 2009
11	November 18, 2009
12	November 8, 2010

Count Thirteen

The Grand Jury further charges that on or about November 9, 2010, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, aided and abetted by others, did knowingly and intentionally possess iodine, a Listed chemical, knowing and having reasonable cause to believe that it would be used to manufacture methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, § 841(c) and Title 18, United States Code, Section 2.

Count Fourteen

The Grand Jury further charges that on or about November 9, 2010, in the Eastern District of Tennessee, the defendant, TERRY MICHAEL HONEYCUTT, aided and abetted by others, did knowingly, intentionally, and without authority possess chemicals, products, and materials which may be used to manufacture methamphetamine, a Schedule II controlled substance, knowing, intending, and having reasonable cause to believe that the chemicals, products, and materials would be used to manufacture methamphetamine, in violation of Title 21, United States Code, Sections 843(a)(6) and Title 18, United States Code, Section 2.

Forfeiture Allegation

1. The allegations contained in Counts One through Fourteen of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to Title 21, United States Code, Section 853.

2. Pursuant to Title 21, United States Code, Section 853, upon conviction for the offenses alleged in Counts One through Fourteen, the defendant TERRY MICHAEL HONEYCUTT, shall forfeit to the United States any property constituting, or derived from, any proceeds obtained, directly or indirectly, as a result of such offenses and any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the offenses. The property to be forfeited includes, but is not limited, to the following:

Money Judgment

A Money Judgment in favor of the United States and against the defendant, TERRY MICHAEL HONEYCUTT, in the amount of at least $269,751.98 in U.S. Currency, which represents proceeds obtained as a result of the offenses listed above in Counts One through Fourteen. The defendant shall be held jointly and severally liable with his co-defendant for the money judgment.

3. If any of the property described above, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty

the United States shall be entitled to forfeiture of substitute property pursuant to 21 U.S.C. § 853(p).

A TRUE BILL:

_____

GRAND JURY FOREPERSON

WILLIAM C. KILLIAN
United States Attorney

By: /s/
Jay Woods
Assistant United States Attorney

Filed October 22, 2013

Appendix G

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

AT CHATTANOOGA

UNITED STATES OF AMERICA,	:
Plaintiff,	:
-versus-	:CR-1-12-144
TERRY MICHAEL HONEYCUTT,	:
Defendant.	:

Chattanooga, Tennessee
January 23, 2014

BEFORE:THE HONORABLE HARRY S. MATTICE, JR.,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JAY WOODS,
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1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

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Townley & Lindsay
1406 South Crest Road
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Rossville, Georgia 30741

THIRD DAY OF TRIAL
PAGES 318 THROUGH 521

* * * * *

[437]Q And did you do – did you ever work there at Brainerd Army Store in your younger days?

A I did.

Q And when roughly, about how old were you when you worked there?

A Fifteen, 16.

Q And how long was it that you continued to work there?

A Until I started to school.

Q At some point did you start working in some other area or field?

A Yes.

Q And then later did you come back to work at Brainerd Army Store?

A I did.

Q When you came back to work at Brainerd Army Store, about how old were you at that point?

A Let's see. I was probably 30ish.

Q Now, did you have any brothers or sisters?

A I have one brother.

Q And what's that brother's name?

A Tony Dewayne Honeycutt.

Q And is Tony younger or older than you are?

A He's 18 months older.

Q And Tony if you look at him and look at you, is [438] there any significant difference in size?

A They are.

Q And that difference is what?

A He's about 6'3" about 100 pounds more, weighs about 100 pounds more than me.

Q Now, Tony, was he working when you came back when you were around 30 at Brainerd Army or did he come to work there at a later time?

A Since he was about 15 he's always worked there or 16 rather, he started driving.

Q So, Tony worked continuously and you left then you came back?

A Correct.

Q Now, as far as the business itself, have you ever had any ownership interest in this business?

A. I have.

Q And when did you have ownership interest in it?

A When I was probably 17, 18.

Q And what did you do with that ownership interest.?

A I went to school. I used that money and went to school and sold out of or sold it out of the business.

Q After you sold out of the business, have you ever had any ownership interest since then?

A I have not.

Q Do you have any ownership interest now?

[439]A I do not.

Q As far as the store itself, I want to kind of move up a little bit to around the 2008/2009 time.

A Sure

Q You've been working there for a period of time by the time we hit 2008 –

A Correct.

Q -- since like about '99? Had you and your brother sort of taken on roles there?

A Yes. He was the manager and I was the assistant manager.

Q And as far as the assistant manager, can you tell me, basically, what your responsibilities and duties were?

A I set up the schedules for the other employees. I had mostly started probably all of the data entry when we switched over to the POS system. And anywhere from changing a ballast in a bulb to whatever needed to be done.

Q Now, as far as your responsibilities and Tony's, what were Tony's duties more of?

A He more or less did the bank. We both did orders depending upon the company. Any of the

accounting stuff he pretty much did and I did the orders and the data entry.

Q Back 2008, 2009, 2010, did you have any – did you have signature authority on the bank accounts?

A I did not.

[440]Q As far as the money that came in or came out of the bank accounts, did you write checks on it?

A I did not.

Q How were you paid?

A Salary.

Q As far as your salary, did it make a difference how many hours you worked?

A No.

Q Did it make a difference as far as commissions or bonuses or anything like that?

A No. We didn't receive those.

* * * * *

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 31 2016
OFFICE OF THE CLERK

No. 16-142

In the Supreme Court of the United States

TERRY MICHAEL HONEYCUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 21 U.S.C. 853(a)(1) renders the members of a drug conspiracy jointly and severally liable for the forfeiture of the reasonably foreseeable proceeds of the conspiracy.

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In the Supreme Court of the United States

No. 16-142

TERRY MICHAEL HONEYCUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 816 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2016. A petition for rehearing was denied on May 31, 2016 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on July 29, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of conspiracy to distribute iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 846 and 841(c)(2); one count of conspiracy to distribute chemicals and products that would be used to manufacture

methamphetamine, in violation of 21 U.S.C. 846 and 843(a)(6); two counts of distribution of iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 841(c); six counts of distribution of chemicals and products that would be used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6); and one count of distribution of iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 841(c). Judgment 2-3. Petitioner was sentenced to 60 months of imprisonment, to be followed by two years of supervised release. *Id.* at 4-5. The court of appeals affirmed in part, reversed in part, vacated in part, and remanded. Pet. App. 1a-34a.

1. Petitioner and his brother ran the Brainerd Army Store, an outdoor-gear retailer in Chattanooga, Tennessee. Petitioner's brother co-owned the store, and petitioner worked as the salaried manager in charge of sales and inventory. The store sold a product called "Polar Pure," a water purifier containing 99% pure iodine crystals. Iodine is an outdated water-purification method, and before 2008 the store apparently sold only small quantities of Polar Pure—for example, the store's records show just two sales during 2007. Pet. App. 2a; Revised Presentence Investigation Report (PSR) ¶¶ 5, 7; Gov't C.A. Br. 4-5.[1]

Iodine is also a precursor chemical used in a popular method of manufacturing methamphetamine, and the pure form of the chemical found in Polar Pure is preferred by illicit methamphetamine cooks because it does not have to be processed before use. In early 2008, petitioner noticed a growing number of "edgy

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[1] References to "Gov't C.A. Br." refer to the government's Corrected Second Brief filed on June 11, 2015.

looking folks" buying Polar Pure at the store, and he called the Chattanooga Police Department to ask whether the iodine in Polar Pure could be used to make methamphetamine. Petitioner ultimately spoke to the Director of the Tennessee Methamphetamine Task Force, who explained that "Polar Pure was being used to manufacture methamphetamine throughout the community and urged [petitioner] not to sell it 'if he felt uncomfortable.'" Pet. App. 2a (brackets omitted); Gov't C.A. Br. 5-6.

Despite that warning, petitioner and his brother continued to sell increasing quantities of Polar Pure to methamphetamine cooks. Pet. App. 2a-3a. They sold more than 2800 bottles in 2008, and more than 13,000 bottles in 2009. Gov't C.A. Br. 4. Polar Pure became the store's highest-grossing item by a large margin, bringing in roughly $400,000 in revenues and $270,000 in profits between 2008 and November 2010. *Id.* at 4 & n.4; see 1/22/14 Trial Tr. 249-252.

Only petitioner and his brother—and not the store's other employees—sold Polar Pure. They kept it hidden behind the counter, so that customers had to ask for it. And although each bottle of Polar Pure contained enough iodine to purify 500 gallons of water, petitioner and his brother sold up to 12 or more bottles at a time and made sales to customers who returned multiple times per week, and even on consecutive days. Pet. App. 2a-3a; Gov't C.A. Br. 6-9.

Between 2008 and 2010, law enforcement officers found Polar Pure in use at illicit methamphetamine labs across the Chattanooga area. The Brainerd Army Store was the area's only supplier of Polar Pure. Officers visited the store several times and tried to convince petitioner and his brother to step selling the

product to methamphetamine cooks, but the brothers refused. When questioned by the officers, petitioner denied recognizing pictures of people who had bought Polar Pure from him multiple times. He also told officers that the store was selling one case of Polar Pure each month when it was actually selling eight. Petitioner would later tell officers that he and his brother had adopted a "don't-ask-don't-tell policy" for iodine sales. Pet. App. 2a-3a; see Gov't C.A. Br. 9-12.

In November 2010, law enforcement officers halted the brothers' distribution of iodine by executing a search warrant at the Brainerd Army Store and seizing its inventory of Polar Pure. Thereafter, methamphetamine labs using iodine—which had previously been common in the Chattanooga area—became "fairly non-existent." Pet. App. 3a.

2. Petitioner and his brother were indicted on conspiracy and substantive charges related to the distribution of chemicals, knowing or having reasonable cause to believe that they would be used to manufacture methamphetamine. Indictment 1-2. The indictment included a forfeiture allegation under 21 U.S.C. 853, which sought a money judgment holding petitioner and his brother jointly and severally liable for $269,751.98 in proceeds from their offenses. Indictment 2-3; see Pet. App. 67a (second superseding indictment including the same allegations).

Petitioner's brother pleaded guilty and agreed to satisfy $200,000 of the forfeiture sought in the indictment. Petitioner proceeded to trial. The jury acquitted him on three substantive counts and convicted on the remaining 11 counts, including both substantive and conspiracy charges. Pet. App. 4a, 39a.

The district court sentenced petitioner to 60 months of imprisonment, 37 months below the applicable Sentencing Guidelines range. Pet. App. 4a; PSR ¶ 44. The court then solicited briefing on the appropriate amount of forfeiture under 21 U.S.C. 853(a)(1), which provides that "[a]ny person convicted of" certain drug offenses "shall forfeit to the United States * * * any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." See 5/12/14 Sent. Tr. 68. The court observed that petitioner's brother had already paid $200,000, but asked the parties to address whether petitioner should be liable for the remaining $69,751.98. *Id.* at 66.

Although petitioner acknowledged circuit precedent holding that co-conspirators are "jointly and severally liable for any proceeds of the conspiracy reasonably foreseeable from conspiratorial operations," he nonetheless argued against any forfeiture. D. Ct. Doc. 107, at 2 (Apr. 14, 2014). He contended (1) that he had not "personally realize[d] any profits" and therefore had not directly or indirectly obtained any proceeds from the sale of Polar Pure; and (2) that imposition of a money judgment would violate the Eighth Amendment's prohibition on excessive fines. *Id.* at 2-6. The government responded that forfeiture of the remaining $69,751.98 was required under Section 853(a)(1). Among other things, the government noted that petitioner had been "directly involved in deriving the proceeds" from the sale of Polar Pure, including by "work[ing] at the cash register" and "mak[ing] the actual sales of iodine." Pet. App. 53a. The government also argued that a forfeiture of $69,751.98 was consistent with the Eighth Amendment

standard articulated in this Court's decision in *United States* v. *Bajakajian*, 524 U.S. 321 (1998). Pet. App. 53a-55a.

The district court declined to impose a forfeiture. Pet. App. 37a. The court stated that the Brainerd Army Store was not a criminal enterprise; that some sales of Polar Pure were probably for legal uses; and that, as a salaried employee with no ownership interest in the store, petitioner had not personally profited from the conspiracy. *Id.* at 38a-40a.

3. Petitioner appealed his convictions, and the government cross-appealed the denial of a forfeiture. The court of appeals affirmed the convictions and reversed the denial of a forfeiture. Pet. App. 24a-29a.[2]

a. The court of appeals explained that the Second, Third, Fourth, and Eighth Circuits have concluded that 21 U.S.C. 853(a)(1) "mandates joint and several liability among coconspirators for the proceeds of a drug conspiracy." Pet. App. 25a-26a. It acknowledged that the D.C. Circuit reached a contrary conclusion in *United States* v. *Cano-Flores*, 796 F.3d 83 (2015), cert. denied, 136 S. Ct. 1688 (2016). Pet. App. 26a. But the court of appeals found it "unnecessary to probe the reasoning of *Cano-Flores*," *ibid.*, because it concluded that it was bound by circuit precedent interpreting the forfeiture provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, which likewise requires the forfei-

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[2] The court of appeals also vacated petitioner's sentences on three counts for which the district court had imposed terms above the applicable statutory maximum. Pet. App. 23a, 28a-29a. Because petitioner was sentenced to concurrent terms on all of the counts of conviction, that vacatur did not affect his total term of imprisonment. *Id.* at 23a.

ture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from [certain criminal offenses]," 18 U.S.C. 1963(a)(3). Pet. App. 26a-27a.

In *United States* v. *Corrado*, 227 F.3d 543 (6th Cir. 2000), the court of appeals had held that "co-conspirators in a RICO enterprise should be held jointly and severally liable for any proceeds of the conspiracy." Pet. App. 27a (quoting *Corrado*, 227 F.3d at 553). Agreeing with numerous other circuits, *Corrado* reasoned that requiring the government to "prove the specific portion of the proceeds for which each defendant is responsible" would permit defendants "to mask the allocation of the proceeds to avoid forfeiting them altogether." *Ibid.* (quoting *Corrado*, 227 F.3d at 553) (internal quotation marks omitted). In this case, the court concluded that *Corrado* controlled the interpretation of the "virtually identical" forfeiture provision in 21 U.S.C. 853, and it therefore held that petitioner was jointly and severally liable for all of the proceeds of the conspiracy. *Ibid.*

b. Judge Moore concurred in the judgment. Pet. App. 29a-34a. She agreed that the panel was bound by *Corrado*, but she wrote separately to express her agreement with the D.C. Circuit's decision in *Cano-Flores* and "to suggest that the full court consider the issue en banc." *Id.* at 29a.

4. Petitioner sought rehearing and rehearing en banc. After the government filed a response arguing (at 3) that this case "is not a good vehicle" in which to consider the disagreement created by *Cano-Flores*, the court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 47a-48a.

ARGUMENT

Petitioner contends (Pet. 9-25) that 21 U.S.C. 853(a)(1) requires a participant in a drug conspiracy to forfeit only the proceeds of the conspiracy that he personally obtained, and not the proceeds foreseeably obtained by his co-conspirators. The court of appeals correctly rejected that argument, as have at least eight other circuits interpreting Section 853(a)(1) or the parallel forfeiture provision in RICO. Petitioner correctly notes (Pet. 13-16) that the D.C. Circuit departed from that consensus view in *United States* v. *Cano-Flores*, 796 F.3d 83 (2015), cert. denied, 136 S. Ct. 1688 (2016). But the resulting circuit conflict is lopsided and recent. And even if that conflict otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to resolve it because petitioner would be liable for the forfeiture the government seeks here even under the rule adopted in *Cano-Flores*. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that, under 21 U.S.C. 853(a)(1), the members of a drug conspiracy are jointly and severally liable for the forfeiture of the reasonably foreseeable proceeds of the conspiracy.

a. Congress enacted Section 853 and RICO's parallel forfeiture provision in the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, ch. III, 98 Stat. 2040. Congress sought to "enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." S. Rep. No. 225, 98th Cong., 1st Sess. 191 (1983) (Senate Report). Under those provisions, forfeiture "operate[s]

as punishment for criminal conduct in violation of the federal drug and racketeering laws." *Libretti* v. *United States*, 516 U.S. 29, 39 (1995).

Section 853(a)(1) provides that "[a]ny person convicted of a violation" of specified drug laws "shall forfeit to the United States," among other things, "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." Congress further provided that the provisions of Section 853 "shall be liberally construed to effectuate its remedial purposes." 21 U.S.C. 853(*o*). As this Court has observed, "Congress could not have chosen * * * broader words to define the scope of what was to be forfeited." *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989).

For example, Congress used "the term 'proceeds' * * * in lieu of the term 'profits'" because it concluded that the government should not have to prove the defendant's "net profits." Senate Report 199. The statute thus requires a defendant to forfeit "all gross receipts" from the criminal offense, "not just the profits." *United States* v. *Olguin*, 643 F.3d 384, 399 (5th Cir.), cert. denied, 132 S. Ct. 432, and 132 S. Ct. 439 (2011).[3] And by providing for the forfeiture of pro-

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[3] With a single exception, every court of appeals to consider the issue has held that Section 853(a)(1) requires the forfeiture of gross receipts rather than net profits. See, *e.g.*, *United States* v. *Bucci*, 582 F.3d 108, 121-124 (1st Cir. 2009); *United States* v. *Casey*, 444 F.3d 1071, 1076 n.4 (9th Cir.), cert. denied, 549 U.S. 1010 (2006); *United States* v. *Keeling*, 235 F.3d 533, 537 (10th Cir. 2000), cert. denied, 533 U.S. 940 (2001); *United States* v. *McHan*, 101 F.3d 1027, 1041-1042 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997); but see *United States* v. *Jarrett*, 133 F.3d 519, 530-531 (7th Cir.), cert. denied, 523 U.S. 1112 (1998). Again with the exception of the Seventh Circuit, courts of appeals have likewise held

ceeds "obtained" by a defendant as the result of the offense, the statute reaches not only property that a defendant ultimately retained, but also property that a defendant "held in custody" before transferring it to a confederate. *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). Consistent with that broad liability, Section 853 authorizes the imposition of personal money judgments, not just the forfeiture of identifiable property in a defendant's possession. *Olguin*, 643 F.3d at 397 (collecting cases); see 21 U.S.C. 853(p) (permitting the forfeiture of substitute property if the property subject to forfeiture has been transferred or is otherwise unavailable).

b. Section 853(a)(1) does not expressly address the scope of forfeiture liability in conspiracy cases. But a fundamental principle of federal conspiracy law, carried forward from the common law, is that a person who joins a conspiracy "becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013). A "conspiracy is a partnership in crime," and "so long as the partnership in crime continues, the partners act for each other in carrying it forward." *Pinkerton* v. *United States*, 328 U.S. 640, 644, 646 (1946). One familiar consequence of that principle is the *Pinkerton* rule, which holds that a defendant who

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that "'proceeds' in the RICO forfeiture statute refers to gross receipts rather than net profits." *United States* v. *Christensen*, 828 F.3d 763, 822-824 (9th Cir. 2015), petition for cert. pending, No. 16-461 (filed Oct. 5, 2016); see, *e.g.*, *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997); *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996); but see *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003).

joins a conspiracy may be convicted of the "substantive offense[s]" committed by his co-conspirators so long as those substantive offenses were reasonably foreseeable to the defendant and were committed "in furtherance of the conspiracy." *Id.* at 647.

Congress legislates against the backdrop of these "well-established principles," and the legislature should not lightly be assumed to have "erode[d] the common-law principle that, so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators." *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997); see, *e.g.*, *United States* v. *Lake*, 472 F.3d 1247, 1266 (10th Cir. 2007) ("The liability of coconspirators is a well-entrenched feature of federal criminal law. If Congress wishes to limit it in certain circumstances, we would expect it to be explicit about what it is doing.").

In enacting Section 853(a)(1), Congress did not suggest any intent to depart from settled principles governing co-conspirators' responsibility for each other's acts. To the contrary, Congress broadly provided that a defendant is liable to forfeit any property "obtained, directly *or indirectly*, as the result" of a drug offense. 21 U.S.C. 853(a)(1) (emphasis added). That language readily encompasses the traditional principle that a member of a conspiracy is vicariously liable for the foreseeable acts of his co-conspirators. Accordingly, Section 853(a)(1)'s forfeiture obligation "is not limited to property that the defendant acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise." *United States* v. *McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997).

At least five other courts of appeals have adopted that view, holding that "[i]n a drug conspiracy case, defendants may be held jointly and severally liable in a money judgment for all of the foreseeable proceeds of the conspiracy." *United States* v. *Elder*, 682 F.3d 1065, 1072 (8th Cir. 2012) (brackets and citation omitted); accord *United States* v. *Roberts*, 660 F.3d 149, 165 (2d Cir. 2011), cert. denied, 132 S. Ct. 1640 (2012); *United States* v. *Pitt*, 193 F.3d 751, 765 (3d Cir. 1999); *United States* v. *Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999), cert. denied, 529 U.S. 1055 (2000); *McHan*, 101 F.3d at 1043 (4th Cir.).

Numerous courts of appeals have adopted the same interpretation of the parallel RICO forfeiture statute, likewise applying "the familiar rule that a member of a conspiracy is responsible for the foreseeable acts of other members of the conspiracy taken in furtherance of the conspiracy." *Hurley*, 63 F.3d at 22 (1st Cir.); see *United States* v. *Genova*, 333 F.3d 750, 762 (7th Cir. 2003); *United States* v. *Edwards*, 303 F.3d 606, 643-644 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003); *United States* v. *Corrado*, 227 F.3d 543, 553 (6th Cir. 2000); *United States* v. *Simmons*, 154 F.3d 765, 769-770 (8th Cir. 1998); *United States* v. *Benevento*, 836 F.2d 129, 130 (2d Cir. 1988); *United States* v. *Caporale*, 806 F.2d 1487, 1507-1508 (11th Cir. 1986), cert. denied, 482 U.S. 917, and 483 U.S. 1021 (1987).[4] And the advisory committee's notes to the Federal Rule of Criminal Procedure gov-

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[4] The Eleventh Circuit has concluded that in some circumstances a co-conspirator may be required to forfeit the proceeds of the conspiracy even if those proceeds were not reasonably foreseeable. *United States* v. *Browne*, 505 F.3d 1229, 1279-1280 (2007), cert. denied, 554 U.S. 918 (2008).

erning forfeiture proceedings likewise recognize that "[c]riminal defendants may be jointly and severally liable for the forfeiture of the entire proceeds of the criminal offense." Fed. R. Crim. P. 32.2(c) advisory committee's note at 144.[5]

As the courts of appeals have explained, a contrary interpretation would severely undermine the purpose of the forfeiture provisions Congress enacted in 1984. Recognizing that a conviction of drug defendants that leaves intact their "economic power base[]" is "of only limited effectiveness," Congress designed forfeiture provisions to "strip these offenders * * * of their economic power." Senate Report 191. And Congress was particularly concerned that existing forfeiture provisions "fail[ed] adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction." *Id.* at 195. A requirement that the government "determine the precise allocation" of proceeds among co-conspirators would recreate a version of the same problem, allowing conspirators to "mask the allocation of the proceeds" among themselves and thereby "avoid forfeiting them altogether." *Caporale*, 806 F.2d at 1508. Denying forfeiture because "the government cannot prove exactly which defendant received how much of the pot" would "defeat[] the purpose of the [forfeiture] provision." *Ibid.*

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[5] Other forfeiture statutes contain language similar to that found in Section 853(a)(1) and the parallel provision of RICO. See, *e.g.*, 18 U.S.C. 982(a)(2) (various offenses, including mail fraud, wire fraud, and bank fraud affecting a financial institution); 18 U.S.C. 982(a)(8)(B) (telemarketing fraud); 18 U.S.C. 1030(i)(1)(B) (computer fraud). The government is not aware of any decision rejecting application of co-conspirator liability under those provisions.

Moreover, a contrary interpretation of Section 853(a)(1) would create anomalous results by giving "conclusive weight" to whether a particular co-conspirator "physically handled the money." *Hurley*, 63 F.3d at 22. It would mean, for example, that low-level couriers could be subject to greater forfeitures than "higher level" conspirators who played larger roles in the offense, but handled less of the cash. *Ibid.* Rather than fixing the amount of forfeiture based on "whether an individual co-conspirator happened to possess" the proceeds—a fact that may be "largely fortuitous"—the "foreseeable amount" of proceeds from the conspiracy "represents the sounder measure of liability." *Ibid.*

c. Petitioner identifies no valid reason to abandon the rule of co-conspirator liability that has long prevailed in the vast majority of the circuits.

First, petitioner asserts (Pet. 20-21) that co-conspirator liability is inconsistent with the text of Section 853(a)(1) because a defendant only "obtain[s]" the "proceeds that actually reach that defendant." But Congress imposed forfeiture liability for proceeds that a defendant obtains "directly *or indirectly*." 21 U.S.C. 853(a)(1) (emphasis added). As even petitioner concedes, that language indicates that forfeiture is not limited to proceeds that the defendant *personally* obtains. Petitioner acknowledges, for example, that a defendant "indirectly" obtains proceeds that flow to "persons or entities that are under the defendant's control," or "persons for whom th[e] defendant has a legal or moral obligation of support." Pet. 21 (quoting *Cano-Flores*, 796 F.3d at 92). It is equally sensible to say that when a joint criminal enterprise foreseeably obtains property, all of the co-conspirators "indirect-

ly" obtain those proceeds, without regard to how they then choose to allocate the funds amongst themselves. That is particularly true in light of the settled rule that a conspiracy is a "partnership in crime" in which the members "act for each other in carrying it forward." *Pinkerton*, 328 U.S. at 646.

Petitioner objects (Pet. 22) that Congress did not expressly provide for co-conspirator liability in Section 853. But the rule that "conspirators are liable for the acts of their co-conspirators" is a "well-established" principle of federal criminal law that forms part of the backdrop against which Congress legislates. *Salinas*, 522 U.S. at 63-64. Congress need not expressly provide for co-conspirator liability in each federal criminal statute; to the contrary, Congress is presumed to have incorporated that well-settled background rule absent some indication to the contrary. See *id.* at 64; see also, *e.g.*, *Lake*, 472 F.3d at 1266 (holding that restrictive language in a criminal statute is not "an implied repeal of traditional liability for partners in crime").[6]

Second, petitioner contends that the general principle of co-conspirator liability is inapplicable to forfeitures because "*Pinkerton* * * * is a doctrine which speaks only to a defendant's substantive liability—not to the consequences of such liability."

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[6] Petitioner therefore draws the wrong inference (Pet. 22) from 18 U.S.C. 3664(h), which provides that a court imposing a restitution order may either "make each defendant liable for payment of the full amount of restitution" or "apportion liability among the defendants." That provision shows that Congress can depart from the background rule of co-conspirator liability when it wishes to do so, but Congress's failure to depart from that rule in Section 853 confirms that the usual rule of co-conspirator liability applies.

Pet. 24 (quoting *Cano-Flores*, 796 F.3d at 94). But *Pinkerton* liability for substantive crimes committed by a defendant's co-conspirators is simply one application of the broader principle that a person who joins a conspiracy "becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith*, 133 S. Ct. at 719; see *Pinkerton*, 328 U.S. at 646-647. That principle also applies in other contexts, including in determining the consequences of substantive criminal liability. For example, the Sentencing Guidelines permit attribution to a defendant for sentencing purposes of the reasonably foreseeable conduct of jointly undertaken criminal activity. Sentencing Guidelines § 1B1.3(a)(1)(B). Accordingly, "[i]t would be odd * * * to depart from th[e] principle of attributed conduct when it comes to apply the forfeiture rules, which have aspects of both substantive liability and of penalty." *Hurley*, 63 F.3d at 22.[7]

Third, petitioner contends (Pet. 22-23) that co-conspirator liability is inconsistent with the purpose of Section 853 because requiring a defendant to forfeit money that the defendant did not personally receive makes forfeiture tantamount to a punitive "criminal fine[]." But Section 853's purpose extends beyond

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[7] For much the same reason, petitioner is wrong to assert (Pet. 24) that "joint-and-several liability is contrary to the *Pinkerton* rule" because *Pinkerton* results in individual convictions and sentences rather than joint liability. The underlying principle that co-conspirators are responsible for each other's acts is the same in each context. Joint-and-several liability in the forfeiture context is simply the result of the rule that the government cannot twice collect the proceeds of the offense. See *Hurley*, 63 F.3d at 23 ("The government can collect [the proceeds of a conspiracy] only once but, subject to that cap, it can collect from any [conspirator] so much of that amount as was foreseeable to that [conspirator].").

merely requiring defendants to "give up [tainted] assets, so as not to benefit from [their] crimes" (Pet. 22). As explained above, Section 853(a)(1) requires forfeiture of the gross receipts from criminal activity, not just its net profits; extends to proceeds that the defendant merely held before transferring to others; and permits the imposition of a personal money judgment, not just the forfeiture of specific tainted assets. See pp. 9-10 & note 3, *supra*. As this Court has explained, an "*in personam* criminal forfeiture" like the one at issue here "is clearly a form of monetary punishment" analogous to a "traditional 'fine.'" *Alexander* v. *United States*, 509 U.S. 544, 558 (1993). And although co-conspirator liability can result in "a formidable penalty" under Section 853 and the parallel provision in RICO, "there is no reason to think that this result is unattractive to Congress, which requested a broad construction" of both forfeiture statutes. *Hurley*, 63 F.3d at 23; see 21 U.S.C. 853(*o*).

Finally, petitioner errs in suggesting (Pet. 24-25) that the absence of a federal right to seek contribution from co-conspirators indicates that Congress did not intend to impose joint-and-several liability. Petitioner's argument relies on *Paroline* v. *United States*, 134 S. Ct. 1710 (2014), which relied in part on the absence of a federal right to contribution in holding that Congress did not make every possessor of an image of child pornography jointly and severally liable for the victim's "entire losses." *Id.* at 1725. But the Court rejected joint-and-several liability primarily because that case "d[id] not involve a set of wrongdoers acting in concert" and because joint-and-several liability would have made a single defendant liable for the combined consequences of the acts of "tens of thou-

sands" of "independently acting offenders." *Ibid.* No such incongruity exists in applying the familiar rule that the confederates in a single conspiracy are responsible for each other's foreseeable acts in furtherance of their joint criminal enterprise.

2. Petitioner contends (Pet. 10-18) that this Court should grant review to resolve the circuit conflict created by the D.C. Circuit's decision in *Cano-Flores*. But that lopsided and newly minted split does not warrant this Court's intervention. And even if it did, this case would not be an appropriate vehicle in which to resolve the question presented because petitioner would be liable for the forfeiture the government seeks even under the rule announced in *Cano-Flores*.

a. *Cano-Flores* arose from the prosecution of a "mid-level manager" in the Gulf Cartel, "one of the largest and most infamous drug cartels in Mexico." 796 F.3d at 85, 94. The defendant was convicted of conspiring to manufacture and distribute cocaine and marijuana for importation into the United States, and the district court ordered a $15 billion forfeiture under 21 U.S.C. 853(a)(1). *Cano-Flores*, 796 F.3d at 85, 90. That amount reflected an estimate of the "gross cartel proceeds that were reasonably foreseeable" to the defendant. *Id.* at 90.

The D.C. Circuit vacated the forfeiture order. Acknowledging its disagreement with every other court of appeals to have considered the issue, the D.C. Circuit held that Section 853(a)(1) "does not authorize imposition of a forfeiture based on the total revenues of a conspiracy simply because they may have been reasonably foreseeable." *Cano-Flores*, 796 F.3d at 91. Instead, the court held that Section 853(a)(1) principally encompasses "funds that actually *reach* the de-

fendant." *Id.* at 92. But the court indicated that a defendant "obtain[s]" proceeds for purposes of Section 853(a)(1) even if he serves as an intermediary who passes the funds along to another conspirator. See *ibid.* (explaining that the ultimate recipient in such a transaction obtains proceeds "indirectly" while the intermediary receives the funds "directly").

The D.C. Circuit also acknowledged that its rule could encompass "cases where the flow of funds is a good deal more subtle." *Cano-Flores*, 796 F.3d at 92. The D.C. Circuit suggested, for example, that a defendant may be deemed to have "obtain[ed]" proceeds if she "receiv[ed] increased compensation as an indirect benefit" of the offense. *Ibid.* And the court indicated that a defendant may be regarded as "indirectly" obtaining proceeds even in some circumstances in which the defendant does not personally receive them—for example, where the proceeds are "received by persons or entities that are under the defendant's control" or by family members or other "persons for whom th[e] defendant has a legal or moral obligation of support." *Ibid.*

b. The conflict created by the D.C. Circuit's decision in *Cano-Flores* does not warrant this Court's intervention. *Cano-Flores* involved highly unusual facts and an exceptionally large forfeiture award. The government did not seek rehearing en banc of the panel's interlocutory decision, and no subsequent case has given the D.C. Circuit the opportunity to revisit the panel's interpretation of Section 853(a)(1)—or to apply that interpretation to circumstances involving more typical flows of funds among co-conspirators. Conversely, with the exception of the decision below, no other court of appeals has had the opportunity to

reconsider its interpretation of Section 853(a)(1) in light of *Cano-Flores* or to respond to the D.C. Circuit's arguments. Under the circumstances, this Court's review would be premature.

c. In any event, this case would not be an appropriate vehicle in which to consider the question presented even if that question otherwise warranted this Court's review. The forfeiture the government seeks here would be appropriate even under the standard adopted in *Cano-Flores*, and the resolution of the question presented thus would not affect petitioner's liability.

Petitioner contends (Pet. 19-20) that this case is an appropriate vehicle because he did not have an ownership interest in the Brainerd Army Store and thus did not share in the profits from the store's sales of Polar Pure. But *Cano-Flores* did not hold that a defendant "obtains" the proceeds of an offense only if he is the ultimate financial beneficiary. To the contrary, the D.C. Circuit indicated that a defendant obtains any proceeds "that actually *reach* the defendant," even if the defendant then passes them along to a co-conspirator. 796 F.3d at 92; see *Hurley*, 63 F.3d 21.

That is exactly what happened here. Petitioner was the manager of the Brainerd Army Store "in charge of sales and inventory." Pet. App. 2a. Only petitioner and his brother sold Polar Pure, and the evidence at trial established that petitioner *personally* sold a substantial amount of the iodine distributed during the conspiracy. *Ibid.*; see, *e.g.*, 1/21/14 Trial Tr. 56-57 (petitioner sold four bottles to an undercover officer on October 26, 2009); *id.* at 66-67 (same on November 2, 2009); *id.* at 72-73 (petitioner sold the officer 15 bottles on November 6, 2009); *id.* at 81-82

(same on November 18, 2009); *id.* at 92 (petitioner sold the officer one bottle on November 8, 2010).[8]

Each time petitioner personally made an unlawful sale of Polar Pure, he "directly" obtained the proceeds from that sale. And particularly because the government seeks a forfeiture of only $69,751.98—roughly a quarter of the store's profits from sales of Polar Pure and less than a fifth of its gross receipts, see Gov't C.A. Br. 4—those personal sales alone would provide a sufficient basis for the forfeiture even under *Cano-Flores*'s interpretation of Section 853(a).[9]

Even setting aside petitioner's personal sales, moreover, he would properly be regarded as having "indirectly" received the proceeds of the Brainerd Army Store's sales of Polar Pure even without the application of co-conspirator liability. This is a case involving what *Cano-Flores* termed a "more subtle" flow of funds. 796 F.3d at 92. The conspiracy was run out of a small, family-owned business, and petitioner

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[8] At trial, petitioner asserted that his brother worked the sales counter more often than he did. 1/23/14 Trial Tr. 445-446. But petitioner sold the bulk of the iodine purchased by the undercover officer who testified at trial, and other witnesses who visited the store stated that they found the brothers at the counter in "equal amounts." 1/22/14 Trial Tr. 171; see, *e.g.*, *id.* at 304 (cooperating witness testified that he bought from each brother "on more than one occasion" and could not say which one was at the counter more often).

[9] In this case, the government has sought forfeiture in an amount equal to the profits from the Brainerd Army Store's sales of Polar Pure. Indictment 2. But as the government observed below, Section 853(a)(1) provides for the forfeiture of gross receipts, not merely profits. Gov't C.A. Fourth Br. 7 (citing *United States* v. *Logan*, 542 Fed. Appx. 484, 498 (6th Cir. 2013), cert. denied, 134 S. Ct. 1531 (2014)); see p. 9 & note 3, *supra*.

was directly involved in all of the store's sales of Polar Pure because he was solely responsible for maintaining its inventory. 1/23/14 Trial Tr. 498. Even where petitioner did not personally handle the proceeds of the sales, those proceeds ultimately went to a store owned by his brother. And although petitioner was paid by salary, he received an "indirect benefit" from the sales of Polar Pure, *Cano-Flores*, 796 F.3d at 92, which became the store's top-selling and most-profitable product and contributed substantially to its total revenue, 1/22/14 Trial Tr. 249-252. This case is thus far removed from *Cano-Flores*, which involved a $15 billion forfeiture imposed on a mid-level member of a vast conspiracy involving "tens of thousands" of other participants. 796 F.3d at 90. The D.C. Circuit's vacatur of the forfeiture award at issue there does not suggest that it would conclude that a $69,751.98 forfeiture is inappropriate under the very different circumstances presented here.

At a minimum, these complications would make this case a poor vehicle in which to resolve the disagreement created by *Cano-Flores*. At the panel stage, Judge Moore expressed her agreement with *Cano-Flores* and "suggest[ed] that the full court consider the issue en banc." Pet. App. 29a. But after the government highlighted the vehicle problems described above in its response to a petition for rehearing en banc (at 3-6), the court of appeals denied rehearing en banc with neither Judge Moore nor any of her colleagues requesting a vote. Pet. App. 47a-48a. Even if this Court were otherwise inclined to take up the question presented, it should likewise await an appropriate vehicle.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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RECORD AND BRIEFS

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No. 16-142

IN THE
Supreme Court of the United States

TERRY M. HONEYCUTT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Government correctly concedes that the circuits are divided on whether 21 U.S.C. § 853(a)(1) mandates joint and several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy. It nonetheless opposes certiorari by proposing two alternative new theories supporting a forfeiture award that it did not raise below, and pronouncing those theories "vehicle problems." Those new theories are waived by the Government; irrelevant to the Sixth Circuit's decision; and entirely without factual support. This case is an ideal vehicle to resolve the circuit split.

The bulk of the Government's brief argues that the Sixth Circuit's decision was correct on the merits. Yet the Government does not meaningfully grapple with the arguments that led the D.C. Circuit to hold that § 853(a)(1) does not mandate joint and several liability among co-conspirators, in conflict with the decision below. *See United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015). The Court should grant certiorari and reverse.

I. The Court Should Grant Certiorari In This Case.

The Government acknowledges that the circuits are divided on the recurring question of law presented by this case. BIO 8, 18. It nonetheless opposes certiorari, primarily by advancing two alternative theories under which a forfeiture verdict could purportedly be upheld even without a rule of joint and several liability. BIO 19-22. The Government's arguments are waived, irrelevant, and meritless.

The Government's first theory is that Petitioner "obtained" the funds from Polar Pure sales because Petitioner physically handled the money before putting it in the cash register. BIO 20-21. The Court should disregard this argument, as it is completely new. The Government did not raise it when it sought forfeiture in the District Court; the District Court did not consider it; the Government did not raise it in the Sixth Circuit as a ground for reversal; and the Sixth Circuit did not consider it either. Rather, throughout this case, the Government has sought forfeiture exclusively on the basis of joint and several liability for co-conspirators, and that legal theory was the sole basis for the Sixth Circuit's decision. *See* Pet. App. 25a-28a.

On its merits, the Government's argument suffers from numerous problems. For one, the Government seeks to hold Petitioner jointly and severally liable for $269,751.98, which were the total profits of Polar Pure sales. BIO 4; *see* Pet. App. 67a. Yet Petitioner did not handle all that money. As the Government acknowledges, Petitioner testified at trial that his brother worked the sales counter more often than he did. BIO 21 & n.8.

In order to evade this problem, the Government, remarkably, asks the Court to find Petitioner's testimony not credible. *Id.* Instead, citing the testimony of witnesses who only went to the store a few times, it asks the Court to draw an inference that Petitioner spent an "'equal'" amount of time as his brother. *Id.* The Government then speculates that, assuming this baseless inference is correct, Petitioner might have handled some unspecified amount of money

exceeding $69,751.98, which is the remaining amount of money necessary to satisfy the forfeiture judgment. *Id.*

It is inappropriate for the Government to be making these arguments for the first time at the certiorari stage. The Government bears the burden of proving the amount of property that Petitioner acquired during the conspiracy. 21 U.S.C. § 853(d)(1). And the Federal Rules anticipate that any factual disputes over forfeiture will be resolved by the District Court. Fed. R. Crim. P. 32.2(b)(1)(B). The Government made no factual record on the amount of money Petitioner handled and did not request or obtain factual findings on that issue from the District Court. It should not be offering raw factual speculation in a Supreme Court brief.

The Government's argument has other defects. For instance, the Government's premise is that by physically touching money for a few seconds before putting it in the cash register, Petitioner "obtained" that money, such that the Government can obtain forfeiture of the money from Petitioner's general assets. BIO 20-21. This is a counterintuitive proposition to say the least, and the Government cites no case in which property was forfeited under this theory; its sole authority is a pure dictum from a single lower-court decision, and even that case assumes that forfeiture would be appropriate only if the defendant physically possessed the money at the time that it was seized by the government. BIO 10, 20 (citing *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995)); *Hurley*, 63 F.3d at 21 ("imagining" scenario in which defendant "had been caught with the [property] just before

delivering it"). Also, the Government did not seek or obtain any factual findings on what proportion of purchases were made using non-cash methods of payment. Indeed, there is no factual record on the Government's theory whatsoever.

The Government's next "vehicle problem[]" is that Petitioner should be liable for forfeiture because he benefited from the Polar Pure sales. BIO 21-22. As the petition described, however, the Government explicitly acknowledged in the District Court that Petitioner did *not* benefit from the sales of Polar Pure, and its sole basis for seeking forfeiture was joint and several liability for co-conspirators. Pet. 19-20. And when it declined to impose forfeiture, the District Court made a factual finding that Petitioner did not benefit from the sales of Polar Pure. *Id.* As the petition explained, it is these features of this case that make it such a perfect vehicle. *Id.* Tellingly, the Government completely ignores this portion of the petition.

Instead, notwithstanding its explicit waiver and the District Court's factual finding, the Government speculates that Petitioner somehow benefited from the Polar Pure sales. BIO 20-22. Even if it was not waived, this argument would be meritless. The Government seeks to hold Petitioner jointly and severally liable for $269,751.98, yet there is simply no evidence that Petitioner achieved *any* benefit, let alone the amount of the benefit. The Government points out that Petitioner's brother was the store owner, BIO 21-22, but there is no evidence on how, if at all, Petitioner benefited from his brother's earnings. The Government also points out that Petitioner received a

salary. BIO 22. But there is no evidence on how much money in wages Petitioner received during the conspiracy. Nor is there evidence on whether Petitioner's wages were higher during the conspiracy than they were before the conspiracy. Nor is there evidence on the proportion of Petitioner's salary that could be allotted to the conspiracy—a critical question, in light of the District Court's undisputed factual finding that the "Brainerd Army Store itself was not a criminal enterprise." Pet. App. 38a.

Waived and utterly lacking in factual support, the Government's newly-minted theories are two of the least persuasive "vehicle problems" the Court is ever going to see. But the critical point is this: Even if the Government had properly preserved these theories, they still would be irrelevant, because the Sixth Circuit undisputedly did not rely on them. Rather, the Sixth Circuit relied exclusively on the theory that co-conspirators were jointly and severally liable for forfeiture of drug proceeds—the theory that has divided the courts of appeals. That holding is thus squarely presented for the Court's review.

The Government's remaining arguments against certiorari are makeweights. The Government speculates that the D.C. Circuit might someday "revisit" *Cano-Flores*, BIO 19, but *Cano-Flores* is now binding circuit precedent which the Government declined to challenge in an en banc or certiorari petition.

Despite the fact that virtually every circuit has considered either the question presented or its RICO equivalent, the Government weakly suggests that more

percolation might be useful "to respond to the D.C. Circuit's arguments." BIO 20. But as this case illustrates, additional percolation would serve little purpose: the Sixth Circuit found it "unnecessary to probe the reasoning of *Cano-Flores*" in light of its own circuit precedent, Pet. App. 26a-27a, and other circuits would likely follow suit. Moreover, even if other circuits chose to "respond to the D.C. Circuit's arguments," BIO 20, the split would not go away; only this Court can resolve the split.

The Government also argues that the amount of money at issue in *Cano-Flores* was larger than the amount of money here. BIO 22. But that factual distinction was irrelevant to the Sixth Circuit's holding. As the Government admits (BIO 8, 18), this case presents a genuine split. The D.C. Circuit explicitly rejected its sister circuits' view of the law, and held that § 853(a)(1) does not mandate joint and several liability for co-conspirators, Pet. 13-16, while the Sixth Circuit explicitly rejected the D.C. Circuit's view of the law in *Cano-Flores*, and held that § 853(a)(1) does mandate joint and several liability for co-conspirators. Pet. 6-9.[1]

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[1] Moreover, the forfeiture amount in this case, although certainly smaller than the forfeiture amount in *Cano-Flores*, was nonetheless substantial. The U.S. Code prescribes a maximum fine of $250,000 for *any* individual committing *any* felony, unless a defendant achieved pecuniary gain from the crime or a statute states otherwise. 18 U.S.C. § 3571(b)(3). That is the applicable statutory maximum fine for the crimes of conviction in this case. 21 U.S.C. §§ 841(c); 843(a)(6), (d)(1); 846; Pet. 4. Thus, Petitioner was held jointly and severally liable for an amount—$269,751.98—exceeding the maximum theoretical fine for the worst possible

Finally, the Government argues that the Court should defer to the Sixth Circuit's unexplained order denying rehearing en banc. BIO 22; *see also* Pet. App. 47a-48a (order denying petition for rehearing en banc). But the Sixth Circuit and this Court are not similarly situated. As the Government explained to the Sixth Circuit in its opposition to Petitioner's petition for rehearing en banc, "even if the full Court were to ... adopt the interpretation of 21 U.S.C. § 853(a) set forth in *Cano-Flores*, the circuit split would still remain." Resp. Opposing Def's Pet. for Reh'g *En Banc* and for Panel Reh'g at 6, No. 14-5790 (6th Cir. Apr. 19, 2016), ECF No. 48. By contrast, if the Court grants certiorari, it would resolve the circuit split nationwide.

II. The Sixth Circuit's Decision Is Wrong.

Contrary to the Sixth Circuit's holding, 21 U.S.C. § 853(a) does not mandate joint and several liability for co-conspirators.

The plain text of the statute supports Petitioner. Under § 853(a)(1), a defendant must forfeit illicit proceeds that he "obtained." "In ordinary English, a person cannot be said to have 'obtained' an item of property merely because *someone else* (even someone else in cahoots with the defendant) foreseeably obtained it." *Cano-Flores*, 796 F.3d at 91 (emphasis in original). The Government emphasizes that a

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offender. Additionally, even the amount remaining on the forfeiture judgment—$69,751.98—is very onerous, given that Petitioner is indigent. Notably, the District Court, which declined to order forfeiture, also declined to impose any fine on Petitioner, in light of Petitioner's inability to pay. Pet. App. 43a.

defendant must forfeit proceeds that he obtained "'indirectly,'" BIO 11, 14, but there is a difference between *indirectly* obtaining something and *not* obtaining something. When a tutor assists a college student with his studies, the tutor doubtless foresees that the student will graduate, but he does not "indirectly obtain" the student's degree; likewise, when an accountant fills out a tax return, he does not "indirectly obtain" his client's tax refund; and for the same reason, when a person participates in a criminal conspiracy, he does not "indirectly obtain" the proceeds that were actually obtained by other people.

The Government points out that *Pinkerton v. United States*, 328 U.S. 640 (1946), was on the books at the time that § 853(a)(1) was enacted, and argues that "Congress did not suggest any intent to depart from settled principles governing co-conspirators' responsibility for each other's acts." BIO 10-11. But "*Pinkerton*, even on its own terms, is a doctrine which speaks only to a defendant's substantive liability—not to the consequences of such liability." *Cano-Flores*, 796 F.3d at 94. Thus, *Pinkerton* did not "settle[]" any "principles" relevant to this case that could overcome the absence of any textual provision for joint and several liability.

Moreover, the far more pertinent "settled principles" are those governing *forfeiture*. For most of American history, forfeiture proceedings were *in rem* proceedings directed at tainted property. *See generally Austin v. United States*, 509 U.S. 602, 613 (1993). A person in Petitioner's position, who never obtained any tainted property, could not have been

affected by such a proceeding. Nothing in § 853(a)(1) suggests that Congress intended to modify that fundamental feature of forfeiture by requiring defendants to forfeit assets they never obtained.

The Government also argues that joint and several liability would advance the statutory purpose of preventing defendants from thwarting forfeiture by transferring tainted assets. BIO 13. But § 853 contains explicit statutory procedures designed to solve that problem. *See* § 853(c) (authorizing forfeiture of property transferred to third parties); § 853(p) (authorizing forfeiture of substitute property when defendant transfers or conceals assets). Section 853 says nothing about joint and several liability, and the Court should not rewrite the statute based on the Government's generic appeals to statutory purpose. Moreover, whereas § 853 contains specific procedures permitting the Government to forfeit assets from co-conspirators who *do* receive tainted assets, *see* §§ 853(c), (n), the Government's interpretation would allow the Government to forfeit assets from co-conspirators who *do not* receive tainted assets—an outcome completely untethered from the Government's stated statutory purpose. Finally, as the petition explained, the Government's interpretation could have the perverse consequence of allowing defendants to *keep* tainted assets, so long as co-conspirators satisfy any portion of the forfeiture judgment—an outcome inconsistent with the Government's asserted statutory purpose. Pet. 23-24. The Government ignores this argument altogether.

The Government points out that an "'*in personam*

criminal forfeiture'" has historically been considered a monetary punishment analogous to a fine. BIO 17. That point is true enough, but it supports Petitioner rather than the Government, because criminal fines have never been subject to joint and several liability for co-conspirators. If a court imposes a criminal fine on a drug felon, the drug felon has to pay out of his own pocket; the court does not collect portions of the fine from his co-defendants. Joint and several liability is a concept borrowed from tort law, not the law of criminal fines, and nothing in § 853(a)(1) suggests that Congress intended to import tort-law principles that historically had nothing to do with forfeiture. Pet. 24.

Finally, the absence of any right of contribution shows that Congress did not intend to impose joint and several liability on co-conspirators. Pet. 24-25 (citing *Paroline v. United States*, 134 S. Ct. 1710 (2014)). The Government asserts that there is no "incongruity" in holding co-conspirators "responsible for each other's foreseeable acts in furtherance of their joint criminal enterprise." BIO 18. But there is an obvious incongruity that arises from the absence of a right of contribution: under the Government's view, a more culpable drug felon who personally received the proceeds of a drug felony could keep all those proceeds, while a less culpable co-defendant who did not receive anything could be forced to pay a large forfeiture award, merely because the less culpable co-defendant was prosecuted first. The absence of a right of contribution for the less culpable co-defendant is strong evidence that Congress did not intend for co-conspirators to be jointly and severally liable for

forfeiture judgments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

TERRY M. HONEYCUTT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Under 21 U.S.C. §853(a)(1), a person convicted of violating a federal drug law must forfeit to the government "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation."

The question presented is:

Does 21 U.S.C. §853(a)(1) mandate joint-and-several liability among co-conspirators for forfeiture of the reasonably foreseeable proceeds of a drug conspiracy?

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BRIEF OF PETITIONER

Petitioner Terry M. Honeycutt respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit (Pet. App. 1a-34a) is reported at 816 F.3d 362 (6th Cir. 2016). The District Court's oral determination on forfeiture (Pet. App. 35a-46a) is unreported. The Sixth Circuit's order denying the petition for rehearing en banc (Pet. App. 47a-48a) is unreported.

JURISDICTION

The judgment of the Sixth Circuit was entered on March 4, 2016. A timely petition for rehearing en banc was denied on May 31, 2016. A timely petition for certiorari was filed on July 29, 2016, which this Court granted on December 9, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, ch. III, §303, 98 Stat. 2040, 2044, are codified at 21 U.S.C. §853. 21 U.S.C. §853(a)(1) provides:

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.

21 U.S.C. §853 is reproduced in its entirety in an Appendix to this brief.

STATEMENT OF THE CASE

A. Petitioner's Drug Convictions

Petitioner Terry Honeycutt worked as the salaried employee in charge of sales and inventory at a hardware store in Tennessee called the Brainerd Army Store. Pet. App. 2a. Petitioner's brother, Tony Honeycutt, co-owned the store. Pet. App. 2a.[1] The Brainerd Army Store stocked an iodine-based water purification product known as Polar Pure. Pet. App. 2a. In 2008, Petitioner noticed an increased number of "edgy looking folks" purchasing Polar Pure. Pet. App. 2a. He contacted the Chattanooga Police Department to ask whether Polar Pure could be used to manufacture methamphetamine. *Id.* The Chattanooga Police Department advised Petitioner that it could, and urged him not to sell Polar Pure if he felt "uncomfortable." *Id.* The Brainerd Army Store continued to sell Polar Pure, however, and sold it to undercover officers. Pet. App. 2a-3a.

Petitioner and his brother were indicted for federal drug crimes related to the sale of Polar Pure. Petitioner's brother pleaded guilty, but Petitioner went to trial. Pet. App. 3a-4a. A jury convicted Petitioner of

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[1] Petitioner's father, Bill Honeycutt, was the other co-owner.

two counts of conspiracy to distribute iodine, while knowing or having reasonable cause to believe that it would be used to make methamphetamine, in violation of 21 U.S.C. §§841(c), 843(a)(6), and 846. Pet. App. 4a, 5a; *see also* Pet. App. 63a-68a (second superseding indictment). The jury also convicted Petitioner of nine other counts related to the possession and distribution of iodine, while acquitting him of three counts. Pet. App. 4a.

B. Forfeiture Proceedings in District Court

The government sought forfeiture in the amount of $269,751.98. The government contended that this figure corresponded to the Brainerd Army Store's "total profit from iodine sales." Pet. App. 52a. Because Petitioner's brother had already forfeited $200,000 pursuant to his plea agreement, the government argued that Petitioner should have to forfeit the remaining $69,751.98. Pet. App. 39a, 62a.

Petitioner argued, however, that he should not have to forfeit the Brainerd Army Store's profits from the sale of Polar Pure, because he never received any of those profits—they flowed solely to his brother, the owner of the Brainerd Army Store. Petitioner pointed out that he did not have any ownership interest in the Brainerd Army Store, proving the point with documentary evidence. Dkt. 107, Ex. A (Brainerd Army Store's annual corporate reports).[2] He also testified at

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[2] All citations to "Dkt." are to the District Court docket at *United States v. Honeycutt*, No. 1:12-cv-00144-HSM-WBC (E.D. Tenn.).

trial that he held no ownership interest in the store. Pet. App. 72a-73a. Petitioner also testified that he had no authority to withdraw money from the Brainerd Army Store's bank account, again proving the point with documentary evidence confirmed by his trial testimony. Dkt. 107, Ex. B (bank records); Pet. App. 74a.

The District Court then solicited additional briefing on whether Petitioner should be liable for forfeiture. The government acknowledged that Petitioner "did not have a controlling interest in the store selling the listed chemical and did not stand to benefit personally from the illegal sales." Pet. App. 60a. It argued, however, that because "defendant's coconspirator did have an ownership role and did stand to benefit personally from the $269,751.98 in profit from the sales of the listed chemical ... the Court should hold the defendant jointly liable for the profit from the illegal sales." Pet. App. 60a-61a.

The District Court declined to require forfeiture. The court acknowledged that Petitioner "was involved in a criminal conspiracy," but concluded that "it's difficult for me to say that [Petitioner] personally ... profited from that illegal conspiracy." Pet. App. 40a. The court relied on Petitioner's "lack of an ownership interest in the Brainerd Army Store," noting that Petitioner was "a salaried employee." Pet. App. 40a. The Court also explained that "the government has conceded" that "what Mr. Honeycutt's financial motivations may have been, are just not clear in this case." Pet. App. 40a. The Court therefore "decline[d] to order forfeiture against [Petitioner] in this case." Pet. App. 41a.

C. Sixth Circuit's Decision

The Sixth Circuit reversed. It concluded that Petitioner was jointly and severally liable for all of the conspiracy's profits, regardless of whether he ever received those profits. Pet. App. 24a-28a.

The court noted that there was a conflict of authority on whether §853(a)(1) countenances joint-and-several liability for co-conspirators. The court acknowledged that the D.C. Circuit "has held that §853 does not countenance joint and several liability." Pet. App. 26a (citing *United States v. Cano-Flores*, 796 F.3d 83, 90-95 (D.C. Cir. 2015)). The court, however, found it "unnecessary to probe the reasoning of *Cano-Flores*": In the court's view, it was bound by a prior Sixth Circuit decision that imposed joint-and-several liability under RICO's forfeiture provision, which the court regarded as indistinguishable. Pet. App. 26a-27a (citing *United States v. Corrado*, 227 F.3d 543 (6th Cir. 2000)).

Judge Moore concurred in the judgment. She agreed that *Corrado* bound the panel, but wrote "to emphasize why that prior panel was likely incorrect." Pet. App. 29a. She observed that the D.C. Circuit's analysis in *Cano-Flores* was "more thorough than any conducted by the many circuits that hold that joint-and-several liability is available, and it persuades me that we should reconsider *Corrado*." Pet. App. 32a.

SUMMARY OF ARGUMENT

Petitioner's brother obtained $269,751.98 from the drug crime in this case. Petitioner obtained nothing. Yet the judgment below orders Petitioner to "forfeit" this money he never received under the rubric of "joint-

and-several liability." And because Petitioner's brother struck a plea deal, Petitioner must actually *pay* the $69,751.98 that the government excused his brother from forfeiting. That is $69,751.98 of drug proceeds Petitioner's brother keeps. The question here is whether 21 U.S.C. §853(a)(1) provides for the joint-and-several conspiracy liability that yields this result. The Court should answer that question in the negative.

1. Section 853(a)(1)'s text rejects joint-and-several liability. It limits forfeiture to property derived from "proceeds *the person obtained*" from certain drug crimes. 21 U.S.C. §853(a)(1) (emphasis added). Here, Petitioner did not "obtain" $269,751.98; his brother did. Petitioner's conspiracy conviction does not change that simple fact. With the text so clear, the Court need go no further.

2. Structure tells the same story, as joint-and-several liability makes nonsense of nearly every provision of §853. From start to finish, that section makes clear that what is subject to forfeiture is *tainted* property—the actual property constituting, or derived from, the proceeds of drug crimes. For example, §853(c) provides that all "right, title, and interest" in forfeitable property "vests in the United States upon the commission of" drug crimes. Title can only vest in *actual* property obtained from crime. Petitioner received no such property. Yet joint-and-several liability required Petitioner to "forfeit" property anyway. Equally striking is §853(p)'s "substitute property" provision, which allows the government to obtain money from a defendant's general assets if tainted property "cannot be located," or has been "transferred" or "commingled." 21

U.S.C. §853(p)(1). Only if a defendant *once had* tainted property can it be lost, transferred, or commingled. Petitioner never had such property. Indeed, as applied to co-conspirators who never received tainted property, the whole notion of "substitute property" becomes bizarre. Substitute for what?

3. Section 853 builds on a centuries-long tradition of *in rem* forfeiture statutes. *In rem* forfeitures by definition target specific, tainted property. And under such statutes, joint-and-several liability was unknown, and indeed, would have been incoherent. When Congress enacted modern criminal forfeiture statutes in the 1970s and 1980s, it streamlined procedures in order to ease enforcement—for example, permitting *in personam* forfeitures as part of criminal sentences, rather than requiring separate civil actions. But Congress did not alter the fundamental principle that forfeiture targets specific, tainted property. The legislative history is express that Congress did not intend any "significant expansion of the scope of property subject to forfeiture" and instead sought to reach "[t]he same type of property ... now subject to civil forfeiture." S. Rep. No. 98-225, at 192, 211 (1983).

4.A. Joint-and-several liability undermines forfeiture's remedial purposes—to ensure crime-tainted property will not again "be used for illegal purposes," and to prevent criminals from "profit[ing] from their illegal acts." *United States v. Ursery*, 518 U.S. 267, 290-91 (1996). Forfeiture serves these purposes by seizing the tools the drug kingpin used to build his empire, and the profits he received. But under joint-and-several liability, every dollar forfeited from an underling is a

dollar that the kingpin, who *actually* received the money, gets to keep and use to offend again.

B. Criminal forfeitures are also intended to punish. But joint-and-several liability follows no rational theory of punishment. Such forfeitures function like criminal fines—orders to pay money from the defendant's untainted assets. For *actual* fines, Congress crafted a detailed scheme to set proportionate punishment, which considers both the defendant's culpability and the fine's burden. But §853's forfeitures-cum-fines are mandatory, pegged solely to the amount foreseeably received by *someone else*. Such judgments violate the core tenet that criminal punishment is individualized. Joint-and-several liability treats every co-conspirator as interchangeable, and the amount any co-conspirator must pay depends not on individual culpability, but on how much the government has extracted from others and in what order it brings prosecutions.

C. Joint-and-several liability ill fits criminal punishment because it is not a criminal-law concept. It derives from tort. Tort law compensates innocent victims, and in this context, joint-and-several liability embodies the judgment that the victim can recover his full losses from any culpable defendant—to guard against the risk that some defendants will be unreachable or insolvent. But this principle does not square with criminal forfeitures, which fill government coffers and do not compensate victims. Such forfeitures also lack the safeguard that makes joint-and-several tort liability workable and fair: a right to contribution, so that less culpable defendants can pass along liability to those more responsible. This Court recently found in *Paroline*

v. United States, 134 S. Ct. 1710 (2014), that the absence of contribution indicated that Congress did not intend joint-and-several liability for restitution. *Id.* at 1725. The same is true here.

5. The canons of construction point the same way. The government asks the Court to impose joint-and-several liability as an atextual expansion of the *Pinkerton* doctrine. But the rule of lenity requires giving *defendants* the benefit of every doubt, not rewriting criminal statutes to favor the government. Constitutional avoidance also compels rejecting joint-and-several liability. Joint-and-several liability yields excessive fines in violation of the Eighth Amendment. Under §853, forfeitures are mandatory wherever authorized—which inevitably leads to results like a $15 billion judgment holding an underling responsible for an entire Mexican drug cartel. Sixth Amendment violations, too, predictably result: This Court has squarely held that defendants have no right to use *tainted* assets to pay their attorneys, but that the Sixth Amendment *does* entitle them to use *untainted* assets. Yet the government's position subjects to seizure all of a defendant's untainted assets.

6. Contra the government, *Pinkerton* does not support joint-and-several liability. Section 853's text and structure are crystal clear, and in any event, *Pinkerton* is inapplicable. *Pinkerton* holds that one conspirator can be convicted of another's *substantive offenses*. At issue here, however, is not substantive liability, but forfeiture imposed as part of a defendant's *sentence*. And under *Pinkerton*, defendants receive individual sentences that they must discharge

individually. Petitioner and his brother, for example, did not receive a five-year prison sentence that could be discharged by incarcerating one or the other. Monetary liability is no different. Indeed, it is hard to understand how the government thinks *Pinkerton* could support joint-and-several liability. When this Court decided *Pinkerton*, forfeitures of tainted assets were *in rem*.

The Court should reject the government's attempt to rewrite §853 to create joint-and-several liability.

ARGUMENT

I. SECTION 853(A) LIMITS FORFEITURE TO PROCEEDS THE DEFENDANT "OBTAINED," AND THEREFORE DOES NOT APPLY TO PROCEEDS THE DEFENDANT DID NOT OBTAIN.

The text of §853(a)(1) resolves this case in Petitioner's favor. Forfeiture under §853(a)(1) is mandatory, applying without exception to "[a]ny person convicted" of certain drug crimes. 21 U.S.C. §853(a). It is also broad, reaching "any property constituting, or derived from, any proceeds" of the crime. *Id.* §853(a)(1). In just one respect, however, it is limited: The property must derive from "proceeds *the person obtained*, directly or indirectly, as the result of" the crime. *Id.* (emphasis added). The question here is whether that limit can be squared with the joint-and-several liability the government imposed on Petitioner, holding him responsible for proceeds that went entirely to Petitioner's co-conspirator.

The answer is no. Forfeiture under §853(a)(1) is limited to proceeds the person "obtained." The verb "to

obtain" means "[t]o bring into *one's own* possession ... esp[ecially] through effort." *Black's Law Dictionary* 1247 (10th ed. 2014) (emphasis added). As the D.C. Circuit observed, in "ordinary English a person cannot be said to have 'obtained' an item of property merely because someone else (even someone else in cahoots with the defendant) foreseeably obtained it." *United States v. Cano-Flores*, 796 F.3d 83, 91 (D.C. Cir. 2015); *see also Sekhar v. United States*, 133 S. Ct. 2720, 2725 (2013) ("Obtaining property requires not only the deprivation but also the *acquisition of property*" (emphasis added; quotation marks omitted)).

Section 853(a)(1)'s plain text thus decides the question presented. Petitioner did not "obtain" $269,751.98; his brother did. Pet. App. 60a-61a. Likewise, in a $1 million drug conspiracy with 100 underlings and one kingpin, each courier does not "obtain" $1 million (though the kingpin may). That means §853(a)(1) did not authorize the forfeiture judgment against Petitioner.

The government's only textual counterargument is that §853(a)(1) reaches property the defendant "obtained, directly *or indirectly*." 21 U.S.C. §853(a)(1) (emphasis added). Per the government, the word "indirectly" yields joint-and-several liability, because when one member of a conspiracy obtains property, "all of the co-conspirators 'indirectly' obtain" it. BIO 14-15.

The government confuses the distinction between obtaining something *indirectly* and *not* obtaining it. When his brother received $269,751.98 in proceeds, Petitioner did not obtain those funds "indirectly"; he did not obtain them at all. Likewise with the kingpin and his

couriers: A courier that only ever carried $10,000 did not obtain $1 million—even indirectly. The same is true outside the criminal realm. An accountant and his client may agree they will collaborate in filing the client's tax return, just as co-conspirators agree to further the conspiracy. But when the client gets his refund, the accountant does not, via the collaboration, "indirectly obtain" the refund. Similarly, a person who advises a car purchaser does not "indirectly obtain" the car, even though he foresees that the purchaser will.

The adverb "indirectly" serves a different purpose, ensuring that *however* a defendant obtains proceeds, they are forfeitable (so long as the defendant actually obtains them). For example, when proceeds go first from a victim to an intermediary, and only then reach the defendant, the word "indirectly" ensures they remain forfeitable. *Cano-Flores*, 796 F.3d at 91-92. Likewise, "indirectly" reaches proceeds received by entities or people under the defendant's control, such as closely held corporations. *See United States v. Parenteau*, 647 F. App'x 593, 597 (6th Cir. 2016); *United States v. Peters*, 732 F.3d 93, 102–04 (2d Cir. 2013). Thus, Petitioner's co-conspirator, unlike Petitioner, "indirectly obtained" $269,751.98—he indirectly obtained it through his interest in the Brainerd Army Store, a corporation he owned. Pet. App. 2a.

In these situations, the defendants obtained proceeds, albeit indirectly. Petitioner, however, never did: The government conceded, and the district court found as fact, that Petitioner "did not ... benefit personally from the illegal sales." Pet. App. 60a; *see* Pet.

App. 40a. That means §853(a)(1) does not authorize the forfeiture judgment against Petitioner.

II. THE STRUCTURE OF §853 IS IRRECONCILABLE WITH JOINT-AND-SEVERAL LIABILITY FOR CO-CONSPIRATORS.

From start to finish, §853 makes clear that what is subject to forfeiture is *tainted* assets—the actual property constituting, or derived from, the proceeds of drug crimes. And defendants are incapable of forfeiting tainted assets unless they actually received those assets. Section 853 carves out one exception to that principle: under §853(p), the government may require defendants who lose, transfer, or commingle tainted assets to forfeit untainted "substitute property." Again, however, §853(p) requires the defendant to have, at some point, received the tainted assets.

Joint-and-several liability for co-conspirators, however, holds defendants like Petitioner liable for forfeiture when they never received tainted assets and all of their property was obtained through legitimate means. That not only yields nonsensical results under virtually every subsection of §853, but is irreconcilable with cases from this Court explicitly holding that §853 concerns forfeiture of tainted assets.

Section 853(a)(2)—forfeiture of the instrumentalities of crime. Section 853(a)(2) renders forfeitable "the person's property used ... to commit" a drug crime. This provision again requires that the property be "the person's" (meaning, the defendant's), not someone else's. Joint-and-several liability requires

the reverse, demanding one defendant forfeit his own property because someone else used different property to commit a drug crime.

Absurd results follow. Here is an example from Judge Thapar, who was bound to follow the Sixth Circuit's holding in Petitioner's case yet declared that joint-and-several liability was "not the rule [he] would pick" if "[w]riting on a blank slate." *United States v. Solomon*, No. 13-40-ART-(5), (7), (8), 2016 WL 6435138, at *5 (E.D. Ky. Oct. 31, 2016).

> If a person ... used a gun while participating in the conspiracy, then he would have to forfeit the gun. But Congress did not write that he must forfeit "any of any other person's property." Thus, if every other conspirator also used a gun, the defendant would still only have to forfeit his. He would not have to run around collecting his co-conspirators' guns for the government—which, as a forfeiture system, would make little sense.

Id. at *6. Indeed, it is even worse. Imagine a defendant uses a 2010 Chevrolet to carry drugs. Congress' obvious intent under §853(a)(2) was to subject *that* 2010 Chevrolet to forfeiture. "Such is his punishment for donating it to the conspiracy." *Id.* at *9. Under the government's interpretation, however, the government could forfeit any randomly-selected 2010 Chevrolet from any co-conspirator—or even "the doors from one conspirator, the tires from another, and the steering wheel from a third." *Id.* And because liability is joint-and-several, that forfeiture would discharge all other co-conspirators' obligations—which means that the

defendant who actually used his car as part of the conspiracy *can keep the car*. That result is not just bizarre, but frustrates forfeiture's core purpose of preventing the instrumentalities of crime from being reused. *See, e.g., Bennis v. Michigan*, 516 U.S. 442, 452 (1996) ("Forfeiture ... prevent[s] further illicit use" of property) (quotation marks omitted)).

Section 853(a)(3)—forfeiture of defendant's interest in criminal enterprise. The next subsection, §853(a)(3), specifically refutes the government's claim that Congress intended joint-and-several liability for co-conspirators. That subsection compels anyone convicted of "continuing criminal enterprise" to forfeit "any of his interest in," or control over, the enterprise. Continuing criminal enterprise is a form of conspiracy, to which *Pinkerton* principles—on which the government heavily relies here, *see infra* Section VI.A—apply. *See* 21 U.S.C. §848(c);[3] *United States v. Aguilar*, 843 F.2d 735, 737 (3d Cir. 1988); *United States v. Graewe*, 774 F.2d 106, 108 (6th Cir. 1985); *United States v. Michel*, 588 F.2d 986, 999 (5th Cir. 1979). So, if Congress intended joint-and-several conspiracy liability, it should apply here, and each participant should be liable to forfeit the *entire* enterprise's value. But Congress did something different. It required the defendant to forfeit only "his interest" in the continuing criminal enterprise. 21

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[3] Section 848 requires, *inter alia*, a drug crime undertaken "in concert with five or more persons." 21 U.S.C. §848(c)(2)(A).

U.S.C. §853(a)(3). That is the opposite of joint-and-several liability among enterprise participants.[4]

Section 853(c)—title transfer. Under §853(c), "[a]ll right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of" a drug crime. Section 853(c) then authorizes a "special verdict of forfeiture" against "such property that is subsequently transferred" to another, unless the person is a "bona fide purchaser for value" without cause "to believe that the property was subject to forfeiture." *Id.* Thus, when money is exchanged for drugs, or when a car is used to transport drugs, the government's title immediately vests in the money or the car.

Section 853(c) makes sense only if the "property described in subsection (a)"—that is, the property that is subject to forfeiture—is specific tainted property. Only in a specific item of property—such as the actual money exchanged for drugs, or the actual car used to transport drugs—can "title ... vest[] in the United States upon the commission of" a drug crime. Only a

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[4] This provision's history reinforces that Congress declined to enact joint-and-several liability not just for the enterprise *itself*, but for proceeds it generated. Its 1970 precursor contained an analogue to the one that yielded Petitioner's forfeiture, which required anyone convicted of continuing criminal enterprise to forfeit "the profits obtained by him in such enterprise." Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. II, §408(a)(2), 84 Stat. 1236, 1265-66. The phrase "by him" is express in not imposing joint-and-several liability for profits received by others, and underscores that Congress rejected the liability the government inflicted here.

specific item of property may be "subsequently transferred" to a third party. *Id.* And only for a specific item of property does it make sense to ask whether the third party knew "the property" was tainted and so subject to forfeiture. *Id.* This means that the "property described in subsection (a)" is specific tainted property.

So here, the government's title vested in every dollar of the $269,751.98 paid for Polar Pure. But not one such dollar reached Petitioner, and so government title never vested in any of Petitioner's assets, all of which were legitimate. *Supra* at 3-4. That means they were not subject to forfeiture.

If joint-and-several liability exists here, §853(c) becomes nonsensical. Consider again the hypothetical $1 million drug ring. On the government's view, all 100 couriers are subject to a $1 million forfeiture under §853(a). But under §853(c), title to property forfeitable under §853(a) vests, if at all, "upon the commission of" the drug crime. So under the government's theory, title immediately "vests in the United States" not only in the $1 million of proceeds, but in the same amount in the bank account of every co-conspirator—up to $101 million ($1 million for each courier, plus the kingpin). And because liability is joint and several, the moment one co-conspirator forfeits a dollar, the government's title must somehow *un*vest as to a dollar in each co-conspirator's bank account.

That is not all. If there is no requirement that the courier have actually received any tainted property (much less $1 million), then government title cannot attach to specific property the courier possesses; rather, it must attach to all of each courier's property equally.

That means whenever any of the 100 couriers spends a cent, government title follows, subjecting money that courier spends anywhere—the grocery store, the landlord, the barber shop—to a "special verdict of forfeiture" as a "subsequent[] transfer[]" unless the recipient can prove it was unaware of the drug crime. 21 U.S.C. §853(c).

Indeed, three decisions of this Court hold that §853(c) covers—only covers—tainted property in the defendant's possession. *See United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *Luis v. United States*, 136 S. Ct. 1083 (2016). In *Monsanto* and *Caplin*, the Court held that §853 authorizes pre- and post-trial forfeiture orders for tainted assets even when they are earmarked for the defendant's attorney, and that the Sixth Amendment permits this result. *Monsanto*, 491 U.S. at 614, 616; *Caplin*, 491 U.S. at 625-26. The reason was that these were "taint[ed]" assets, and so under §853(c), the defendant "did not hold good title." *Caplin*, 491 U.S. at 627; *see id.* at 626 ("The money, though in his possession, is not rightfully his...."); *Monsanto*, 491 U.S. at 613. By contrast, in *Luis*, this Court held that pretrial restraint of *untainted* assets violates the Sixth Amendment. 136 S. Ct. at 1091 (plurality opinion) (citation omitted). The plurality distinguished *Monsanto* and *Caplin* by emphasizing that those cases had held, as a matter of statutory interpretation, that §853(c) reaches only *tainted* assets. *Id.* (distinguishing *Monsanto* and *Caplin* because those cases concerned "assets that were traceable to the crime" and "thus, the statute passed title ... at the time the crime was

committed ..., see §853(c)"); *id.* ("The Court in those cases referenced §853(c) more than a dozen times. And it acknowledged that whether property is 'forfeitable' or subject to pretrial restraint under Congress' scheme is a nuanced inquiry that very much depends on who has the superior interest in the property at issue.").[5]

Those holdings on §853(c) answer the question presented here. Subsections 853(a) and 853(c) are joined at the hip: All property "described in"—and so forfeitable under—"subsection (a)" is, *by definition*, property in which government title vests under §853(c). So when this Court held that §853(c) applies only to tainted assets "traceable to the crime," *Luis*, 136 S. Ct. at 1091, it also decided that §853(a)(1) does not enact forfeiture of untainted assets unconnected to crime, thus foreclosing the government's argument here.

Section 853(d)—presumption. The government's theory also makes nonsense of §853(d). Section 853(d) establishes a "rebuttable presumption" that property is forfeitable if (1) "such property was acquired" by the defendant during his crime or soon after, and (2) "there was no likely source for such property" besides the crime. 21 U.S.C. §853(d). This provision helps the government prove that particular property derives from

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[5] The *Luis* Court divided on the Sixth Amendment question, but no Justice disputed that §853(c) reaches only tainted assets. *Cf. Luis*, 136 S. Ct. at 1098-1102 (Thomas, J., concurring in the judgment); *id.* at 1107-08 (Kennedy, J., dissenting); *id.* at 1112-13 (Kagan, J., dissenting).

criminal proceeds when "direct evidence" is lacking. *See* S. Rep. No. 98-225, at 212.

This *presupposes* that the government must prove that the defendant received specific tainted property. The questions that §853(d) asks—the time when "such property was acquired" by the defendant, and the existence of a non-criminal "likely source for such property" make sense *only* for specific tainted property, not untainted assets reached via joint-and-several liability. On the government's theory, however, it need not show that a defendant received tainted assets. That leaves §853(d)'s presumption without work to do.

Section 853(e)—pretrial restraints. Section 853(e) authorizes pre-trial asset freezes to "preserve the availability of [forfeitable] property," subject to a hearing. *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014) (quoting *Caplin*, 491 U.S. at 631). As *Kaley* explains, that hearing asks whether there is probable cause "(1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime." *Id.* at 1095 (citing 21 U.S.C. §853(a)); *see* 21 U.S.C. §853(e)(1).

The government's theory banishes that second question from the statute. It is meaningless to ask whether property sought via joint-and-several liability has "the requisite connection to the crime." *Kaley*, 134 S. Ct. at 1095. No such connection is needed. None exists. Under joint-and-several liability, only the *defendant* need have a connection to the crime. The government's view thus takes a two-part test and cuts it to one—whether the defendant "has committed a[] [conspiracy] offense." *Id. Accord Luis*, 136 S. Ct. at 1091

(plurality opinion) (explaining that §853(e)(1) *presupposes* that §853(a) only reaches tainted assets: "§853(e)(1) ... explicitly authorizes restraining orders or injunctions against 'property described in subsection (a) of this section' (*i.e.*, *tainted* assets)" (emphasis in original)).

Section 853(p)—substitute property. The mess joint-and-several liability makes of the statute is most evident in §853(p), the single subsection that allows forfeiture to reach untainted assets. This provision applies if, because of some "act or omission" by the defendant, "any property described in subsection (a)" is unavailable for one of five enumerated reasons: It (A) "cannot be located"; (B) "has been transferred or sold"; (C) is "beyond the jurisdiction of the court;" (D) has "substantially diminished" value; or (E) "has been commingled." 21 U.S.C. §853(p)(1). When those conditions are met, the court "shall order the forfeiture of any other property of the defendant, up to the value of the [unavailable] property." *Id.* §853(p)(2).

In every way, §853(p) contemplates that the defendant *once had* specific tainted property, which Petitioner did not. Substitute property may only be forfeited if the "property described in subsection (a)" is lost, "transferred," put "beyond the jurisdiction of the court," or "commingled." 21 U.S.C. §853(p)(1). These things can only befall specific tainted property, which means that the "property described in subsection (a)" must be specific tainted property. Indeed, the entire concept of "substitute property" becomes incoherent applied to co-conspirators who never received tainted property. Substitute for what? Their bank accounts are

just an undifferentiated mass of untainted assets, with nothing to substitute for.

Telling, too, is that §853(p) is the only instance where §853 directs forfeiture of "the value of" property, rather than the property itself. 21 U.S.C. §853(p)(2). Yet on the government's reading, §853(a)(1) *also* authorizes such a forfeiture in any conspiracy—any co-conspirator who does not receive the tainted property must forfeit "the value" thereof. This violates basic principles of statutory interpretation: When "Congress includes particular language in one section of a statute but omits it in another," the presumption is "that Congress acts intentionally and purposely in the disparate" treatment. *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted).

The government's position fares just as badly in practice as on the text. For the drug kingpin who actually obtained $1 million, forfeiture is limited to his tainted assets, unless the government can satisfy §853(p)'s substitute property requirements. But for the 100 couriers, the government could, based on joint-and-several liability, *directly* obtain a $1 million money judgment under §853(a)(1). The result is strange indeed. Suppose the government struggles to satisfy the substitute property requirements—for example, the tainted money cannot be located, and the government cannot show its absence was due to the defendant's "act or omission" (or cannot show "due diligence" in trying to find the money). 21 U.S.C. §853(p)(1). The government could not then obtain anything from the kingpin. But on the government's theory here, it could extract $1 million

from every other co-conspirator *except the person who actually got the money*.

The government's position thus makes nonsense not just out of §853(a)(1), but of virtually every provision in that section.

III. FORFEITURE'S CENTURIES-LONG HISTORY CANNOT BE RECONCILED WITH JOINT-AND-SEVERAL LIABILITY.

Section 853 so relentlessly targets specific tainted property because it built on a 200-plus year tradition of forfeiture law doing precisely that. Section 853 altered traditional forfeiture in certain respects to streamline enforcement, but it preserved this essential feature—which cannot be squared with joint-and-several liability.

A. Section 853's Historical Antecedents Targeted Specific Assets and Left No Room for Joint-And-Several Liability.

Section 853 requires forfeiture of tainted property associated with crime. Similar forfeiture statutes have existed in the United States for hundreds of years, and they have never imposed joint-and-several liability.

In the early Republic, "forfeiture" was an umbrella term which referred to virtually any conveyance of money or property resulting from an unlawful act. "Forfeitures" ranged from purely punitive fines, *see, e.g.*, *Austin v. United States*, 509 U.S. 602, 614 n.7 (1993), to purely remedial money judgments designed to "reimburs[e] the Government for the losses accruing from the evasion of customs duties." *United States v. Bajakajian*, 524 U.S. 321, 342 (1998).

Section 853, however, descends from a particular type of forfeiture that is deeply entrenched in our national tradition—forfeiture of specific property that becomes tainted because of its link to crime. "Long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of English and local forfeiture statutes, which provided for the forfeiture of commodities and vessels used in violations of customs and revenue laws." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (alterations and quotation marks omitted). And after, Congress immediately enacted its own such laws—first, "ships and cargoes involved in customs offenses," then "vessels used to deliver slaves to foreign countries," and later, "those used to deliver slaves to this country." *Id.*; *see also United States v. Parcel of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Ave.*, 507 U.S. 111, 119-20 (1993) (plurality opinion). Eventually, these forfeitures expanded beyond ships and their cargos. For instance, early statutes required forfeiture of real property used to manufacture alcohol, and automobiles used to transport it, when the alcohol was sold in violation of the tax laws. *Dobbins' Distillery v. United States*, 96 U.S. 395, 400 (1877); *J.W. Goldsmith, Jr., Grant Co. v. United States*, 254 U.S. 505, 508 (1921). By the time of §853(a)'s enactment in 1984, forfeiture statutes had proliferated to "reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo*, 416 U.S. at 683.

These forfeitures were *in rem*. As Justice Story explained, the "thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." *The Palmyra*, 25 U.S. 1, 14 (1827); *see United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844) ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner"); *see also Dobbins' Distillery*, 96 U.S. at 400 (similar); *J.W. Goldsmith*, 254 U.S. at 512. That remained true even if the same conduct triggered criminal liability: "Many cases exist, where there is both a forfeiture in rem and a personal penalty," but the *in rem* forfeiture of the thing "stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *The Palmyra*, 25 U.S. at 14-15.

Joint-and-several liability was unknown under such statutes, and would have been nonsensical: In these actions, jurisdiction was "dependent upon seizure of a physical object." *United States v. Ursery*, 518 U.S. 267, 289 (1996) (quotation marks omitted). With the proceeding "targeting the property itself," there was no room for *in personam* joint-and-several liability. *Id.*

B. Section 853 Carries Forward the Traditional Understanding That Forfeiture Targets Specific Tainted Property.

By enacting criminal "forfeiture" in §853, Congress thus "transplanted from another legal source," *Sekhar*, 133 S. Ct. at 2724, this country's centuries-long heritage of civil forfeiture laws. When Congress does that, it "brings the old soil with it." *Id.* (quotation marks

omitted). And in this old soil, joint-and-several liability does not grow. Nothing in §853 changed that fact. *See id.* (When "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken," except to the extent the statute expressly rejects those settled rules (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

To be sure, §853 did not just codify existing forfeiture doctrine. Where traditional American forfeiture was civil and *in rem*, §853 and similar statutes are criminal and *in personam*. *Compare Dobbins' Distillery*, 96 U.S. at 400-02; *J.W. Goldsmith*, 254 U.S. at 508, *with Luis*, 136 S. Ct. at 1099 (Thomas, J., concurring in the judgment); *see also* S. Rep. No. 98-225, at 82, 193. Likewise, by extending forfeiture to cover "property constituting, or derived from, ... proceeds" of crime, these statutes "marked an important expansion of governmental power." *Parcel of Land*, 507 U.S. at 121-22 & n.16 (plurality op.).

Equally clear, however, is that §853 did not alter the core principle that forfeiture targets specific crime-tainted property. The statute itself says so: It extends forfeiture to proceeds, but—again—limits forfeiture to "property ... derived from ... proceeds the person obtained" as a result of crime. 21 U.S.C. §853(a)(1). This is only one of §853's myriad limitations to specific property. *Supra* Section II.

Legislative history confirms what the text makes clear. Modern criminal forfeiture statutes date to the

enactment of the Racketeer Influenced and Corrupt Organizations ("RICO") statute, in which Congress "call[ed] on our common law heritage to meet an essentially modern problem," seeking to combat "the forces of organized crime" in "racketeering and drug trafficking." S. Rep. No. 91-617, at 79 (1969); *see* S. Rep. No. 98-225, at 191. When it enacted §853(a)(1), Congress did *not* intend any "significant expansion of the scope of property subject to forfeiture," aside from the just-mentioned forfeiture of "proceeds," S. Rep. No. 98-225, at 192; *see id.* at 194-95; rather, Congress "focus[ed] on improving the procedures applicable in forfeiture cases." *Id.* at 192.[6]

First, traditional forfeiture required "a separate civil action ... in each district in which ... property is located." *Id.* at 210. That "waste[d] valuable judicial and

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[6] RICO's legislative history explains that, by enacting *in personam* forfeiture based on a conviction, Congress melded the *in rem* forfeiture tradition with a separate type of forfeiture liability. *See* S. Rep. No. 91-617, at 79-80. In England, the "convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero-Toledo*, 416 U.S. at 682. This provided precedent for "the concept of forfeiture as a criminal penalty" operating *in personam*. *See* S. Rep. No. 91-617, at 80. But criminal forfeiture statutes retained the *in rem* tradition of requiring a connection between the crime and the property. *See id.* (forfeiture limited to property "which is the subject of the specific offense involved...., and not ... any other property of the convicted offender"). Moreover, English felony forfeitures provide no support for *joint-and-several* forfeiture liability. These forfeitures likewise operated only against particular tainted property—the specific property tainted by the convicted felon's ownership. *Calero-Toledo*, 416 U.S. at 682.

prosecutive resources" when the evidence "in the criminal case will be largely dispositive." *Id.*; *cf. The Palmyra*, 25 U.S. at 15 (traditional forfeiture "stands independent of ... any criminal proceeding"). So, Congress provided a "more efficient mechanism" that "consolidate[d] the forfeiture action with the criminal prosecution." S. Rep. No. 98-225, at 210; *see id.* at 196-97. Second, Congress believed defendants were too often "defeating forfeiture by removing, transferring, or concealing" assets. *Id.* at 195. So Congress enacted the "substitute asset" provision and improved procedures for pre-trial asset freezes. *Id.* at 192, 195-96.

But these procedural fixes did not upend bedrock forfeiture principles to enact joint-and-several liability against defendants who never received tainted assets at all, as the legislative history repeatedly confirms. First, even as Congress expanded forfeiture to "proceeds," it stressed that "proceeds ... will be forfeitable only to the extent that they are derived from" crime. *Id.* at 199. That rejects the government's view that it may obtain money *not* derived from crime (leaving aside §853(p)'s substitute-property provision).

Second, Congress explained that §853(a)(1) reaches "[t]he same type of property ... now subject to civil forfeiture." *Id.* at 211. This statement again refutes the government's claim that §853(a)(1) expanded forfeiture to never-before-seen terrain—untainted property with no connection to crime, reached only via joint-and-several liability.

Third, Congress affirmed that the law "is a codification of the 'taint'" theory. *Id.* at 200, 211-12. That further forecloses the government's view that it may

obtain forfeiture when the defendant never received tainted property.

In short, neither the history of American forfeiture generally, nor that of §853 specifically, supports the government's position that Congress in §853 enacted a never-before-seen variety of joint-and-several liability.

IV. JOINT-AND-SEVERAL FORFEITURE LIABILITY SERVES NO RATIONAL REMEDIAL OR PUNITIVE PURPOSE.

Section 853(a)(1) is both remedy and punishment. By requiring forfeiture of specific crime-tainted property, §853(a)(1) furthers the historical remedial purposes of civil asset forfeiture—ensuring the property will not again be used for crime, and depriving criminals of profits from their crimes. By imposing forfeiture as part of a criminal sentence, §853(a)(1) punishes the defendant for his crimes. Joint-and-several liability serves neither goal. Indeed, it ensures that the worst drug offenders can *keep* the proceeds of their crimes, thus undermining forfeiture's remedial goal, and imposes arbitrary and irrational penalties on defendants like Petitioner, thus undermining forfeiture's punitive goal.

A. Joint-and-Several Liability Undermines Forfeiture's Remedial Purposes.

Forfeiture ensures crime-tainted property will not again "be used for illegal purposes." *Ursery*, 518 U.S. at 290. It also prevents criminals from "profit[ing] from their illegal acts." *Id.* at 291. And it "lessen[s] the economic power of criminal enterprises." *Kaley*, 134 S. Ct. at 1094 (quotation marks omitted). Forfeiture does all this by targeting the specific property actually used

in, or derived from, crime. So, for example, forfeiture seizes the tools the drug kingpin used to build his empire, and the profits he received—thus vindicating society's laws and protecting it from the further harm this property might cause.

Joint-and-several liability, however, treats every dollar possessed by any member of a conspiracy the same. The $1,000 that a courier derived from his minimum-wage day job at McDonalds goes just as far in satisfying co-conspirators' joint-and-several forfeiture obligation as $1,000 that the kingpin received from the drug conspiracy. And every dollar the government collects from the courier is a dollar it *cannot* collect from the kingpin.[7] Hence, under joint-and-several liability, forfeiture depends not on whether property is linked to crime, but on whom the government happens to prosecute first.

This undermines all of forfeiture's remedial purposes. The kingpin who receives money or property from drug crimes can keep it, to again "be used for illegal purposes"—so long as his underlings are prosecuted first. *Ursery*, 518 U.S. at 290. When these underlings are jointly and severally liable for the kingpin's proceeds, every untainted dollar they forfeit is a dollar that the kingpin gets to keep as "profit from ... illegal

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[7] Lower courts have repeatedly recognized that joint-and-several liability yields this effect. *See, e.g., Solomon*, 2016 WL 6435138, at *13 ("[J]oint-and-several liability will create accidental martyrs: By serving his punishment, one defendant serves—or at least reduces—the punishment of the rest."); *United States v. Black*, 526 F. Supp. 2d 870, 890 (N.D. Ill. 2007); *see also Restatement (Third) of Torts: Apportionment Liab.* §25(b) (2000).

acts." *Id.* at 291. To that extent, joint-and-several liability ensures that "crime does ... pay." *Kaley*, 134 S. Ct. at 1094. And the kingpin then can reuse the illicit property or reinvest the proceeds into his empire, by hiring more couriers, digging more tunnels, and so on—all because joint-and-several liability frustrated forfeiture's goal to "lessen[] the economic power of criminal enterprises." *Id.* (quotation marks omitted). These counterproductive consequences, moreover, are no mere hypothetical but rather reflect how conspiracy prosecutions actually work: Prosecutors typically start at the bottom and work their way up. *See, e.g.*, David M. Zlotnick, *Federal Prosecutors and the Clemency Power*, 13 Fed. Sent. Rep. 168, 169 (2001) ("As anyone familiar with federal narcotics prosecutions knows, the theory for taking down a trafficking ring is to flip lower-level participants against their higher-up co-conspirators"); Claire McCusker Murray, *Hard Cases Make Good Law: The Intellectual History of Prior Acquittal Sentencing*, 84 St. John's L. Rev. 1415, 1432 (2010) (noting prosecutors' strategy of "encourag[ing] low-level members of organized crime organizations to 'flip,' testifying against their old bosses").

B. Joint-and-Several Liability Undermines Forfeiture's Punitive Purposes.

Forfeiture has always been "understood, at least in part, as imposing punishment." *Austin*, 509 U.S. at 611. Joint-and-several liability, however, is inconsistent with settled punishment principles. It violates forfeiture's historical approach to punishment; yields disproportionate penalties that contravene any theory of

just punishment; and disregards the bedrock principle that criminal punishment is *individual*, not collective.

1. Historical forfeiture was punitive, *see id.*, but always followed a specific theory and measure. Forfeiture punished wrongdoing by "confiscat[ing] property used in violation of the law" and "requir[ing] disgorgement of the fruits of illegal conduct." *Ursery*, 518 U.S. at 284. Joint-and-several liability plainly does not accord with this theory of punishment, as it seizes property never used in violation of the law and targets defendants who never received the "fruits of illegal conduct." *Id.* Instead, such forfeitures function like criminal fines—as orders to pay money from the defendant's untainted assets.

2. As to *actual* criminal fines, Congress crafted a detailed scheme to set proportionate punishment. The criminal fine statute, 18 U.S.C. §3572, requires the court, before imposing a fine, to consider all the general factors that apply to any sentence—that is, the nature of the offense and defendant, and the need for the sentence to reflect "the seriousness of the offense," "afford adequate deterrence," and "protect the public," among others. 18 U.S.C. §3553(a); *see id.* §3572(a). The statute also mandates consideration of a host of fine-specific factors, including the defendant's "income ... and financial resources," the "burden that the fine will impose upon the defendant" and any person "financially dependent" on him, and the fine's effects on the defendant's ability to pay restitution. *Id.* §3572(a)(1)-(2), (b). The fine thus fits the crime.

On the government's theory, however, the forfeiture statute imposes an order to pay money from untainted

assets, yet *prohibits* consideration of the factors Congress deemed necessary for courts to weigh when imposing fines. Defendants like Petitioner thus must pay one amount from their general assets under §3572's reticulated scheme—then another, also from general assets, pegged solely to how much money someone else received as a result of the conspiracy.

This is an irrational scheme, yielding irrational results. In *Cano-Flores*, the district court declined to impose any fine under §3572, yet the government's joint-and-several theory bound it to impose a $15 billion forfeiture reflecting the "gross take" of an entire Mexican drug cartel. *Cano-Flores*, 796 F.3d at 94; *see* Judgment at 5, *United States v. Cano-Flores*, No. 1:08-cr-00057 (D.D.C. May 14, 2013), ECF No. 172. The same thing happened here, where Petitioner was liable for $269,751.98, even though the district court found a fine was inappropriate.

Under Petitioner's view, by contrast, the statutory scheme works. The forfeiture judgment—pegged to the amount the defendant illicitly received—punishes by forcing the defendant to disgorge tainted assets in which the government's title already vested, and which were not legitimately the defendant's in the first place. *See* 21 U.S.C. §853(c). Additional fines, levied against untainted assets, remain on the table, but only if justified given the defendant's culpability and the other statutory factors. 18 U.S.C. §3572; *see id.* §3553(a).

The government's forfeitures-cum-fines also make a mockery of the Alternative Minimum Fines Act. Under that provision, if "any person derives pecuniary gain from the offense, or if the offense results in pecuniary

loss to a person other than the defendant," then "the defendant may be fined not more than the greater of twice the gross gain or ... loss." 18 U.S.C. §3571(d); *cf.* 21 U.S.C. §853(a). Courts decline to impose such gain-based fines when defendants would be unable to pay, or when they would interfere with the ability to make restitution. *See, e.g.*, *United States v. Li*, No. 15 CR. 870-1 (RWS), 2016 WL 1241527, at *5 (S.D.N.Y. Mar. 24, 2016); *United States v. Nelson*, No. 07 CR. 326-01 (RWS), 2008 WL 4962988, at *5 (S.D.N.Y. Nov. 13, 2008). But the government's view of "forfeiture" makes a functionally identical gain-based judgment *mandatory* in any conspiracy case, without consideration of the facts in §3553(a) or §3572.

This provision shows something else, too: When Congress wished to peg monetary judgments to the gains of all participants in a crime, it knew how. Section 3571(d) does so expressly, basing "the defendant['s]" fine exposure on "the gross gain" to "any person." 18 U.S.C. §3571(d); *see United States v. Hui Hsiung*, 778 F.3d 738, 761-62 (9th Cir. 2014) (holding §3571(d) is based on gains to the whole conspiracy but rejecting joint-and several-liability). This tellingly contrasts with §853(a)(1), which ties forfeiture for each defendant to property "the person obtained." 21 U.S.C. §853(a)(1). Settled principles of statutory construction require following, rather than disregarding, this careful distinction. *Russello*, 464 U.S. at 23.[8]

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[8] Indeed, Congress expressly recognized that §3571(d)'s distinctive phrasing was *necessary* to authorize a fine based on gains to other people. That section replaced an earlier provision that, similar to

3. The government's theory also violates another core tenet of criminal punishment: Punishment is individual and individualized. *See, e.g., Gall v. United States*, 552 U.S. 38, 50 (2007) (sentencing courts "make an individualized assessment based on the facts presented"); *see also Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."). Joint-and-several liability does the opposite, treating every conspirator as interchangeable. Co-conspirators may vary considerably in their individual level of culpability, yet the government's position would impose an identical, mandatory forfeiture punishment on all of them.

Worse yet, the amount each defendant will actually have to pay to satisfy the forfeiture judgment depends on the amount that his co-conspirators pay—a result antithetical to the purposes of punishment. If the district court had sentenced Petitioner and his brother to a joint-and-several *prison sentence* of 60 months—allowing either to serve the time, so long as one did—no one could defend it as just punishment. Joint-and-several criminal fines are no better: If a defendant deserves to receive a fine, then the law vindicates this

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§853, tied the authorized fine to gains "the defendant derives." Criminal Fine Enforcement Act of 1984, §6, Pub. L. 98-596, 98 Stat. 3134, 3137. When Congress enacted §3571(d), it explained that the new "any person" language was required to authorize a fine "if a person other than the defendant derives pecuniary gain from the offense." H.R. Rep. No. 100-390, at 6 (1987). Congress thus understood that provisions phrased like §853 did not authorize monetary judgments based on receipts by "a person other than the defendant."

defendant's "personal culpability," *Tison*, 481 U.S. at 149, only if *he* pays it—not if someone else remits the same amount to the U.S. Treasury.

Yet the government defends precisely this indefensible result. The drug kingpin's forfeiture penalty depends on whether his couriers happen to have money to satisfy the joint-and-several judgment, and whether he happens to be prosecuted first or last. And here, Petitioner's liability is based on the amount his brother agreed to pay in his plea deal with the government. *Supra* at 3. Setting criminal punishments that way is indefensible, and only frustrates the punitive goals forfeiture seeks to advance.

C. As Applied to Forfeiture, Joint-and-Several Forfeiture Liability Makes No Sense Based On the Tort Principles From Which Such Liability Derives.

Joint-and-several liability works such great mischief on criminal punishment because it is not a criminal-law concept. It derives from tort. *See Prosser and Keeton on the Law of Torts* §52, at 351 (5th ed., W. Page Keeton et al. eds. 1984). And tort's purposes differ fundamentally from both the remedial and the punitive purposes of criminal forfeiture.

Tort aims "to give compensation, indemnity or restitution for harms." *Restatement (Second) of Torts* §901 (1979). One barrier to such relief is that some defendants may be insolvent or unreachable. Joint-and-several liability reflects the judgment that this risk "should fall on a partially guilty defendant than on a completely innocent victim." *Cano-Flores*, 796 F.3d at

95; *see Restatement (Third) of Torts: Apportionment Liab.* §10, cmt. a (2000) ("as between innocent plaintiffs and culpable defendants the latter should bear th[e] risk" "of insolvency"); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220–21 (1994) (similar). Criminal forfeitures, however, go to the government, like criminal fines. *See* 21 U.S.C. §853(a). They need not compensate injured victims. *see* 21 U.S.C. §853(a), (i); 28 U.S.C. §524(c)(1); *United States v. Bailey*, 630 F. App'x 902, 903 (11th Cir. 2015) ("Once funds have been ordered forfeited, the Attorney General is authorized, in her discretion, to retain the forfeited property ...."). So rules derived from tort law's compensatory purposes have no place. *See Solomon*, 2016 WL 6435138, at *10.

Put differently, joint-and-several liability is sensible only where the law is indifferent to the source of the payment because one dollar is as good as another. That is true in tort, where the victim's goal is to achieve full compensation, and the law prioritizes compensating victims even at the cost of some unfairness to tortfeasors. But forfeiture law is *not* indifferent to the source of payment, for the reasons already explained: Its remedial goals require forfeiting the tainted property *itself*—because only that can assure that the property does not again become a tool of crime, and that the person who received it does not "profit from ... illegal acts." *Ursery*, 518 U.S. at 290-91; *see supra* at 29-31. And forfeiture's punitive goals require punishing the person who actually received tainted property, rather than a different person who did not. *Supra* at 31-36. Joint-and-several liability does not fit.

Criminal forfeiture also lacks the critical safeguard that enables joint-and-several liability in tort: contribution. Where the law has guarded against the risk of insolvency by allowing the injured plaintiff to recover fully from one defendant, fairness dictates allowing that defendant to obtain contribution from others in proportion to their fault—so that liability ultimately rests where it should fall. *See Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 88 (1981) ("[W]hen two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability."); *see Restatement (Third) of Torts: Apportionment Liab.* §23 (2000).

Criminal forfeiture includes no right of contribution. *Cf. Paroline v. United States*, 134 S. Ct. 1710, 1725 (2014) ("There is no general federal right to contribution."). So here, Petitioner had to forfeit $69,751.98 simply because his brother—who obtained all the proceeds—struck a plea deal to forfeit only $200,000. He has no avenue to seek contribution on the ground that his fair share was less. Likewise, if the couriers in the hypothetical drug ring discussed above collectively have the money to satisfy a $1 million forfeiture judgment, they could bear the full liability, unable to pass it on to the kingpin who profited. Indeed, in *Paroline*, this Court recently held that the absence of a right of contribution was evidence that Congress did not intend to impose joint-and-several liability in the context of restitution for victims of child pornography crimes. 134 S. Ct. at 1725. That reasoning applies with full force here.

Federal restitution statutes confirm that Congress knows how to draft compensation-focused sentencing provisions with joint-and-several liability—and provide some of the strongest evidence against the government's position here. Under the general restitution statute, "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant." 18 U.S.C. §3664(h). Congress incorporated this provision in §853, providing that defendants convicted of methamphetamine crimes would be subject to "restitution as provided in section[] ... 3664"—*i.e.*, to joint-and-several liability. 21 U.S.C. §853(q)(1). Then, in the next subsection, Congress enacted a different form of such liability, mandating that defendants "reimburse [the government] for the costs ... for the cleanup" of the meth labs. *Id.* §853(q)(2).

In at least three ways, these provisions underscore that the government's position is wrong. First, they confirm that "when Congress wished to provide" joint-and-several liability, "it knew how to do so and did so expressly." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994) (quotation marks omitted). It did not expect courts to manufacture such liability via strained analogies to tort. The obvious inference from Congress's explicit enactment of joint-and-several liability in §3664 and §853(q) is that when Congress omitted similar language

from §853(a)(1), it meant this distinction to make a difference. *Russello*, 464 U.S. at 23.

Second, §3664 shows that when Congress enacts joint-and-several liability, Congress addresses the unfairness it can yield: It made such liability permissive only (not mandatory). 18 U.S.C. §3664(h). And it authorized courts to account for "the level of contribution ... of each defendant" (to avoid sticking one defendant with burdens others should fairly bear). *Id.* In §853(a)(1), Congress did not address those problems because it did not intend joint-and-several liability in the first place.

Third, these provisions reinforce that Congress enacts joint-and-several liability only where doing so *makes sense*. The goal of restitution is to compensate victims; the goal of §853(q) is to clean up methamphetamine labs. In achieving these goals, a dollar from one defendant is as good as a dollar from any other. Joint-and-several liability is exactly what one would expect, *supra* at 37, and the text of these provisions expressly provides it. Here, by contrast, the government would inflict *nonstatutory* joint-and-several liability that is far *harsher* than what Congress expressly enacted for restitution—where the justifications for such liability are absent. *Id.* The government's view yields these bizarre results because it so badly contradicts the statute.[9]

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[9] At the certiorari stage, the government's response was that §3664(h) *restricts* a power to impose joint-and-several liability that the government would otherwise enjoy. *See* BIO 15 n.6 (§3664(h)

V. THE CANONS OF CONSTRUCTION REJECT JOINT-AND-SEVERAL LIABILITY.

A. The Rule of Lenity Forecloses Joint-and-Several Liability.

Given how decisively text, structure, history, and purpose refute the government's position, the rule of lenity has no work to do. But it reinforces why the government's arguments fail.

"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion); *see United States v. Bass*, 404 U.S. 336, 347-49 (1971). Here, the government has no serious textual argument for why §853(a)(1) commands, or even permits, its reading. Instead, the government claims that the Court should adopt joint-and-several liability based on vague "principle[s] of federal conspiracy law"

"shows that Congress can depart from the background rule of co-conspirator liability when it wishes to do so"). That is obviously wrong. Section 3664(h) expressly *confers* new power, stating that district courts "may make each defendant" jointly and severally liable for restitution. 18 U.S.C. §3664(h). Indeed, the law is clear that a "federal court has no inherent authority to order restitution in a criminal case; it may do so only as expressly provided by statute." *United States v. Wells*, 177 F.3d 603, 608 (7th Cir. 1999) (quotation marks omitted); *accord Paroline*, 134 S. Ct. at 1725; *Hughey v. United States*, 495 U.S. 411, 413 (1990). The government thus is incorrect that §3664(h) merely limits some inherent, unwritten power to impose a particularly *extreme* form of restitution via joint-and-several liability.

supposedly "carried forward from the common law" (which the government, incorrectly, locates in *Pinkerton*), plus a policy argument that forfeiture will be unworkable absent joint-and-several liability (also wrong). BIO 10, 13. These arguments fail on their own terms. *Infra* at 47-55. But regardless, they do not provide what the rule of lenity demands: A federal statute unambiguously enacting joint-and-several forfeiture liability. "In our system, ... defining crimes and fixing penalties are legislative, not judicial, functions." *United States v. Evans*, 333 U.S. 483, 486 (1948). The government flouts these principles with its call to enact joint-and-several liability via common law-esque, policy-driven judicial lawmaking.

The government fails again with its attempt to avoid lenity by invoking §853(o), which specifies that the "provisions of this section shall be liberally construed to effectuate its remedial purposes." 21 U.S.C. §853(o); *see* BIO 9, 17. Even indulging the government's questionable assumption that the rule of lenity may be nullified by statute, *cf. United States v. Lanier*, 520 U.S. 259, 266 (1997) (rule of lenity "ensures fair warning" and avoids potential due process violations), the government's position here does not advance any of §853's "remedial purposes." The legislative history *sets forth* Section 853's "remedial purposes." *Supra* Section III.B. And they were not to work any "significant expansion of the scope of property subject to forfeiture," but to "improv[e] the procedures applicable" by fixing certain discrete procedural flaws. S. Rep. No. 98-225, at 192; *supra* at 25-29. Those purposes have nothing to do with joint-and-several liability. As this Court said of

RICO's similar liberal-construction provision, §853(o) "is not an invitation to apply [the statute] to new purposes that Congress never intended," and it comes into play only "as an aid for resolving an ambiguity" but cannot "be used to beget one." *Reves v. Ernst & Young*, 507 U.S. 170, 183–84 (1993) (quotation marks omitted). Section 853(o) thus has no role to play here. Indeed, as explained, the government's position would *frustrate* forfeiture's traditional remedial purposes, by ensuring that criminal defendants who actually receive assets from crime can keep them. *Supra* at 29-31.

B. Constitutional Avoidance Requires Rejecting Joint-and-Several Liability Given the Grave Questions It Raises Under the Excessive Fines Clause.

When one alternative interpretation would raise "serious constitutional doubts," the canon of constitutional avoidance tells courts to reject it in favor of another that will not, based on the "reasonable presumption that Congress did not intend the alternative which raises [such] doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

Here, the government imputes to Congress the opposite intent. The Eighth Amendment's Excessive Fines Clause prohibits forfeitures when their amount is "grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. And under that clause, joint-and-several liability by its nature will raise case after doubtful case. It makes every underling liable for the conspiracy's entire gross take and all of its assets, provided only that they were foreseeable. The forfeiture judgment thus reflects the size and revenues of the

conspiracy as a whole, no matter that the defendant was the most marginal of two-bit players. So, for example, a courier in the drug ring hypothesized above receives a $1 million forfeiture judgment because the ring also included 99 other couriers—not based on the amount he actually received, or his culpability. Likewise in *Cano-Flores*, a "mid-level manager" received a $15 billion forfeiture judgment reflecting the "gross take" of an entire Mexican drug cartel over a decade. 796 F.3d at 94. At minimum, a monetary penalty amounting to Senegal's annual GDP raises "serious constitutional doubts." *Clark*, 543 U.S. at 381; *see* Int'l Monetary Fund, World Economic Outlook Database (Oct. 2016).

Given these obvious constitutional problems, it matters not whether Petitioner's forfeiture of $69,751.98 (or $269,751.98) would violate the Excessive Fines Clause. As *Clark* explained, the avoidance canon is a tool for ascertaining what a statute means, which does not vary from one case to another. 543 U.S. at 381-82. Hence, if one interpretation raises "constitutional problems, the other should prevail—whether or not th[ey] pertain to the particular litigant before the Court." *Id.* at 380-81.

That rule applies here because the government's reading makes joint-and-several liability mandatory in any conspiracy. No statutory mechanism allows picking and choosing between applications that would potentially violate the Excessive Fines Clause and those that would not. That means the "lowest common denominator, as it were, must govern." *Id.* at 380. Indeed, *Clark*'s rule is especially appropriate here. Via §853, Congress used forfeiture to target "organized

crime and illegal drug[]" rings that had grown into "criminal organizations or enterprises." S. Rep. No. 98-225, at 191. Yet it is precisely there that the government's reading raises constitutional concerns—because, as in *Cano-Flores*, it attributes an organization's entire proceeds to every underling. On the government's view, the statute's potentially unconstitutional applications thus arise not in unanticipated cases, but the statute's heartland. The avoidance canon, therefore, teaches that the government's reading must be rejected.

C. Joint-and-Several Liability Also Raises Grave Sixth Amendment Concerns.

The government's theory is incompatible with the constitutional avoidance canon for a second reason: it forces §853 to inflict Sixth Amendment violations. As explained above, *Caplin* and *Monsanto* held that the Sixth Amendment permitted pre-trial freezes and post-trial forfeitures of money the defendants would use to pay their attorneys, but only because the assets were tainted. *See Caplin*, 491 U.S. at 626 ("A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his ...."); *see also Monsanto*, 491 U.S. at 609-10. In *Luis*, this Court turned that point into a square holding, concluding that "pretrial restraint of ... *untainted* assets needed to retain counsel of choice violates the Sixth Amendment" and distinguishing *Caplin* and *Monsanto* as having "relied critically upon the fact that the property at issue was 'tainted.'" 136 S. Ct. at 1088, 1090 (plurality opinion) (emphasis added).

Under *Caplin* and *Luis*, the government's position inevitably yields Sixth Amendment violations. If §853(a)(1) imposes joint-and-several liability, pre-trial freezes and post-trial forfeitures of untainted assets are mandatory on the government's application, even if the assets are needed to pay an attorney. *See supra* at 16-19; *Monsanto*, 491 U.S. at 612-13 (Section 853(e)(1)(A) "cannot sensibly be construed to give district court discretion to permit the dissipation of [any] property that §853(a) requires be forfeited upon conviction"). In the $1 million drug ring hypothesized above, for example, the government could freeze *all* the assets of *all* 100 couriers, provided only that their net worth is less than $1 million—preventing *any* one of them from hiring their counsel of choice with untainted assets. That squarely violates *Luis*. 136 S. Ct. at 1088 (plurality op.); *id.* at 1096 (Thomas, J., concurring in the judgment). And if the couriers avoid a pre-trial freeze, then after trial the government could seek forfeiture of up to $1 million they had paid their attorneys with untainted assets. Facing that prospect, no one could ever hire a lawyer, even if every dollar in their bank account was earned legitimately. That would raise grave Sixth Amendment concerns given this Court's careful limitation of *Caplin*'s holding to tainted assets. *Caplin*, 491 U.S. at 626; *Luis*, 136 S. Ct. at 1090 (plurality opinion).

Notably, although *Luis* was a fractured decision, the government's position raises grave questions under the views of every member of this Court. Justice Thomas concurred in the judgment because the "common-law forfeiture tradition ... draws a clear line between tainted

and untainted assets," and based on that tradition, he concluded that "the Sixth Amendment prevents the Government from freezing untainted assets." *Luis*, 136 S. Ct. at 1097, 1099. That distinction is precisely why the government's interpretation raises constitutional problems here. Justice Kennedy and Justice Kagan found no Sixth Amendment violation, but only because tainted assets and untainted assets are fungible in the hands of *the same person*. *See id.* at 1109 (Kennedy, J., dissenting) ("Money ... is fungible" because "[t]here is no difference between a defendant who has preserved his or her own assets by spending stolen money and a defendant who has spent his or her own assets and preserved stolen cash instead"); *id.* at 1113 (Kagan, J., dissenting) ("The thief who immediately dissipates his ill-gotten gains and thereby preserves his other assets is no more deserving of chosen counsel than the one who spends those two pots of money in reverse order."). But tainted assets held by one defendant are not fungible with untainted assets of *someone else*. Yet the government here would mandate that a defendant's assets be frozen even if he never received tainted assets. Neither Justice Kennedy nor Justice Kagan endorsed that position.

VI. THE GOVERNMENT'S REMAINING ARGUMENTS FAIL.

A. *Pinkerton* Does Not Support Joint-and-Several Liability for Conspiracy Forfeitures.

Lacking any genuine argument based on §853's text, structure, history, or purpose, the government relies primarily on atextual background principles. Per the government, Congress "legislate[d] against the

backdrop of" a "fundamental principle of federal conspiracy law, carried forward from the common law" and manifested in "the *Pinkerton* rule." BIO 10-11. Under this rule, "a defendant who joins a conspiracy may be convicted of the 'substantive offense[s]' committed by his co-conspirators so long as those substantive offenses were reasonably foreseeable to the defendant and were committed 'in furtherance of the conspiracy.'" *Id.* (quoting *Pinkerton v. United States*, 328 U.S. 640, 644 (1946)). So, the government says, Congress should "be assumed to have" incorporated the *Pinkerton* rule into §853 in a manner that yields joint-and-several liability. BIO 11.

This argument fails at the outset because *Pinkerton* is an interpretation of substantive criminal law, not an inexorable constitutional command. Here, the text, structure, and history of §853—none of which were at issue in *Pinkerton*—so plainly point away from joint-and-several liability for co-conspirators that they overcome any unwritten "assum[ption]" regarding Congress' intent. *Id.*

More fundamentally, this argument fails because the government's background principles are inapplicable. Under the common-law principle embodied in *Pinkerton*, a co-conspirator's conduct can be the basis for a conviction on a "substantive offense." *Pinkerton*, 328 U.S. at 647. But *Pinkerton* does not allow what the government seeks: treating defendants interchangeably as to liability for part of their *sentence*, as joint-and-several liability does. Bonnie can be convicted of Clyde's crimes, but Clyde's 30-year sentence is his alone; it cannot be discharged by, say, Clyde serving 20 years and

Bonnie 10. What the government requests here is a never-before-seen expansion of *Pinkerton*—and one that is inconsistent with all the background principles the government invokes, including *Pinkerton* itself.

The government first relies on "the common law." BIO 10. The government is right that *Pinkerton*'s rule has "roots in the common law," reflecting the rule that "'[s]econdary parties ... are also guilty of unintended crimes committed by the primary party if those crimes are a natural and probable consequence of the intended offense.'" Matthew A. Pauley, *The* Pinkerton *Doctrine and Murder*, 4 Pierce L. Rev. 1, 31 (2005) (quoting Joshua Dressler, *Reassessing the Theoretical Underpinnings*, 37 Hastings L.J. 91, 97 (1992)); *see United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987).

The government's problem is that common-law practice *as to forfeiture* points the opposite way. As explained above, common-law forfeiture always targeted specific property, and never encompassed joint-and-several liability. *Supra* Section III.A. Hence, Congress in §853 could not have intended to "carr[y] forward," BIO 10, a common-law tradition of joint-and-several forfeiture liability. There was none.

Next, the government points to *Pinkerton* itself. *Id.* But nothing in *Pinkerton* supports joint-and-several liability for sentencing consequences like criminal forfeiture. Quite the opposite. *Pinkerton* was laser focused on substantive liability—*i.e.*, the conviction itself—and all its reasoning targeted the building blocks of substantive liability: It held that both "[m]otive or intent" and "overt act[s]" of one co-conspirator were

"attributable to the others for the purpose of holding them responsible for *the substantive offense*." *Pinkerton*, 328 U.S. at 647 (emphasis added). And with both *mens rea* and *actus reus* requirements met, each co-conspirator could be convicted of crimes committed by others "in furtherance of the conspiracy." *Id.*

Pinkerton itself makes clear, however, that its rule did not extend to sentencing consequences of convictions. Walter and Daniel Pinkerton received separate, individual sentences for their substantive convictions: Walter a $500 fine and thirty months, and Daniel $1,000 and thirty months. *Id.* at 641. As with Bonnie and Clyde, they were not jointly-and-severally liable for these sentences, so that if Walter did not pay his fine (or serve his jail sentence), Daniel would do so (or vice-versa). Nor did *Pinkerton* alter the then-existing rules for forfeiture of tainted assets: At the time, the only forfeitures were *in rem*, and so could never touch a co-conspirator who never received tainted assets. *See Alexander v. United States*, 509 U.S. 544, 563 (1993) ("[U]ntil the enactment of RICO in 1970," only in rem forfeitures were "[]known in the federal system...."); S. Rep. No. 91-617, at 79 (As of 1970, the "existing forfeiture provisions under Federal statutes" provided for "proceeding ... in rem against the property").

That history forecloses the government's effort to impose joint-and-several liability here. Lacking any support in the statutory text, the government is left to argue that §853(a) ratified a pre-existing principle that co-conspirators were jointly and severally liable for forfeiture. But given that *Pinkerton* itself did not

impose joint-and-several forfeiture liability, the government cannot conjure from it an unwritten rule of joint-and-several liability that §853 could have silently ratified. *See Solomon*, 2016 WL 6435138, at *10 ("*Pinkerton* is about the crime, not the punishment. The forfeiture statute, meanwhile, is about the punishment, not the crime.").

Finally, the government relies on "fundamental principle[s] of federal ... law." BIO 10. But as to sentencing consequences like forfeiture, the bedrock principle is the opposite of the rule the government advocates. Sentences are individual and individualized, not interchangeable across defendants. *See, e.g.*, *Pepper v. United States*, 562 U.S. 476, 487 (2011) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." (quotation marks omitted)). Even when two defendants' convictions are identical, their sentences are individual, reflecting "the principle that 'the punishment should fit the offender and not merely the crime.'" *Id.* at 487-88 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)); *see also Woodson v. North Carolina*, 428 U.S. 280, 296 (1976); S. Rep. No. 98-225, at 51-52. Each defendant serves his own sentence, pays his own fine, and suffers any other adverse consequences of the judgment himself. Joint-and-several liability is nowhere to be found, unless a statute, like the restitution statute, expressly imposes it. *Supra* at 39-40.

Federal criminal law thus divides into two domains: Substantive offenses (in which *Pinkerton* liability may apply), and sentencing consequences (where liability is individual). That second domain is where criminal forfeitures reside. Not only are such forfeitures expressly part of the "sentence," 21 U.S.C. §853(a); *see* 18 U.S.C. §3554, but this Court has already decided as much. In *Libretti v. United States*, 516 U.S. 29 (1995), this Court held that that "Congress plainly intended forfeiture of assets to operate as punishment for criminal conduct in violation of the federal drug and racketeering laws, not as a separate substantive offense." *Id.* at 39. Indeed, *Libretti* rejected the argument that at least *aspects* of forfeiture were substantive, such that forfeiture should be treated as substantive. *Id.* at 40 (rejecting petitioner's argument that forfeiture is "a hybrid that shares elements of both a substantive charge and a punishment imposed for criminal activity"). "[T]he simple fact," *Libretti* explained, is "that forfeiture is ... punishment" and lives "in the realm of sentencing." *Id.* at 41. And in that realm, individual sentences—not joint-and-several liability—are the rule.

To be sure, sentencing rules sometimes *take account* of co-conspirators' conduct, as under the Sentencing Guidelines. U.S.S.G. §1B1.3. But they do so only as one element of a calculus that is individual and individualized, with the recommended sentences increasing or decreasing to reflect all relevant considerations about the defendant and the crime. *See, e.g.*, *Gall*, 552 U.S. at 50. And the relationship between the co-conspirator's conduct and punishment often is not linear. That is true, for example, under §2D1.1, which

provides that a defendant who possessed (with intent to distribute) 100 grams of cocaine, and to whom 1900 additional grams are attributed under *Pinkerton* (a 20-fold increase), would be subject to only a three-fold increase in minimum imprisonment (63 months compared to 21 months). *See* Drug Quantity Table, U.S.S.G. §2D1.1; *Cano-Flores*, 796 F.3d at 95. The government's rule here, by contrast, increases punishment directly with every dollar a co-conspirator receives.

* * *

At bottom, joint-and-several forfeiture liability is a Frankenstein doctrine held together only by the government's desire to broaden the reach of a liability-expanding rule while throwing aside the limits the law has imposed. The government wants the *Pinkerton* attribution rule of substantive criminal law, but without the individual sentences that have always existed. The government wants the joint-and-several liability of tort, but without the need to either compensate victims or provide a right to contribution. And the government invokes forfeiture's historic power to confiscate the instrumentalities and proceeds of crime—while jettisoning forfeiture's limit to property actually *tainted* by criminality (or substitute assets for property wrongfully dissipated). The Court should reject this unprincipled mashup.

B. The Government's Claim That, Without Joint-and-Several Liability, Forfeiture Will Be Too Hard Is Incorrect and Irrelevant.

Last, the government claims that absent joint-and-several liability, proving forfeiture cases will be too hard. Says the government, it may not be able to "prove exactly which defendant received how much of the pot," and it darkly warns that requiring such proof would "defeat[] the purpose" of forfeiture. BIO 13 (quotation marks omitted).

This argument fails because §853 solves the problem the government complains about. As explained, §853(d) enacts a powerful presumption: If the government shows, by just "a preponderance," that the defendant acquired property "during the period of" his crime and there was no other "likely source," then the property is presumptively tainted. 21 U.S.C. §853(d). If further assistance is needed, the government can seek an order to depose "any witness" to "facilitate the identification and location of property." *Id.* §853(m). And once the government makes the modest showing that §853(d) requires, no heroic steps are needed to trace property; instead, it can proceed via the "substitute property" provision. 21 U.S.C. §853(p).

The government apparently thinks §853's careful scheme is not enough. BIO 13. The government therefore advocates a heretofore unknown forfeiture regime, in which defendants who never received a penny in tainted assets are liable for forfeiture as a kind of prophylaxis against the risk that the government might encounter problems of proof. Only such a system, the government insists, would advance forfeiture's

"purpose." *Id.* But even leaving aside the lack of evidence to support that claim, the government's concerns over any inefficiencies in the current forfeiture regime are properly directed to Congress. The government cannot procure a judicial revision via a joint-and-several liability rule that contradicts §853's plain text and renders much of the system it creates superfluous, incoherent, or both.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

21 U.S.C. §853

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine

otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is

sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has

not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) **Order to repatriate and deposit**

(A) **In general**

Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or

the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) **Failure to comply**
Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure
The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution
Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter

such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d)

of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the

testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the

nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title,

or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) **Return of property to jurisdiction**

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.

RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-142

In the Supreme Court of the United States

TERRY MICHAEL HONEYCUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 21 U.S.C. 853 renders the members of a drug conspiracy jointly and severally liable for the forfeiture of the reasonably foreseeable proceeds of the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 816 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2016. A petition for rehearing was denied on May 31, 2016 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on July 29, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

The relevant statutory provisions and rule are reprinted in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of conspiracy to possess iodine, knowing it would be used to manufacture meth-

amphetamine, in violation of 21 U.S.C. 846 and 841(c)(2); one count of conspiracy to possess chemicals, products, and materials which would be used to manufacture methamphetamine, in violation of 21 U.S.C. 846 and 843(a)(6); two counts of distribution of iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 841(c) and 18 U.S.C. 2; six counts of possession of materials which would be used to manufacture methamphetamine, in violation of 21 U.S.C. 843(a)(6) and 18 U.S.C. 2; and one count of possession of iodine, knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. 841(c) and 18 U.S.C. 2. Petitioner was sentenced to 60 months of imprisonment. The district court denied the government's motion for a criminal forfeiture. The court of appeals affirmed petitioner's convictions but reversed the order denying forfeiture. Pet. App. 1a-34a.

A. Legal Background

Under 21 U.S.C. 853(a)(1), a person convicted of a felony drug offense must forfeit the proceeds of the crime—or, if the traceable proceeds are not available, an equivalent sum from other assets. This case concerns the application of that requirement to the members of a drug conspiracy.

1. Before 1970, criminal forfeiture was essentially unknown in the United States. Instead, forfeiture proceedings were brought as civil actions against the property involved in crime, relying on the fiction that "the property itself is 'guilty' of the offense." *Austin* v. *United States*, 509 U.S. 602, 615 (1993); see *id.* at 613-617; see also *Various Items of Pers. Prop.* v. *United States*, 282 U.S. 577, 581 (1931) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned."). Those *in rem*

actions resulted in the forfeiture of specific "guilty property"—for example, a vessel used to smuggle goods or an illicit distillery—but did not impose personal liability on the individual who committed the offense. *United States* v. *Bajakajian*, 524 U.S. 321, 332 (1998); see *Austin*, 509 U.S. at 615-616.

In 1970, Congress for the first time authorized criminal forfeiture by making forfeiture a penalty for certain violations of the drug laws and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* See *Bajakajian*, 524 U.S. at 332 n.7. Unlike a civil forfeiture, those criminal forfeitures were "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti* v. *United States*, 516 U.S. 29, 39 (1995). And whereas civil forfeitures are *in rem* proceedings directed at specific property, criminal forfeitures are *in personam* and impose personal liability on the convicted defendant. *Bajakajian*, 524 U.S. at 332.

In 1984, Congress expanded existing criminal forfeiture statutes by enacting Section 853 and a parallel forfeiture provision in RICO, 18 U.S.C. 1963. See Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, Tit. II, ch. III, 98 Stat. 2040. Congress sought to "enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." S. Rep. No. 225, 98th Cong., 1st Sess. 191 (1983) (Senate Report). In particular, Congress "intended to eliminate the statutory limitations and ambiguities that ha[d] frustrated active pursuit of forfeiture by Federal law enforcement agencies." *Id.* at 192.

2. Section 853 provides that any person convicted of certain felony drug offenses "shall forfeit to the United States," among other things, "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. 853(a)(1). RICO's forfeiture provision contains materially identical language. 18 U.S.C. 1963(a)(3). The forfeiture of proceeds reflects another departure from traditional forfeiture law, which had until the late 1970s been limited to "contraband and the instrumentalities of crime." Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 25-4(a), at 900 (2d ed. 2013) (Cassella).

Section 853's predecessor provision had required the defendant to forfeit only the "profits" from the offense. 21 U.S.C. 848(a)(2)(A) (1982); see *United States* v. *McHan*, 101 F.3d 1027, 1041 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997). Section 853(a)(1) uses "the term 'proceeds' * * * in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits." Senate Report 199; see *id.* at 211. The statute thus requires a defendant to forfeit "all gross receipts" from the offense, "not just [the] profits." *United States* v. *Olguin*, 643 F.3d 384, 399 (5th Cir.), cert. denied, 565 U.S. 956, and 565 U.S. 958 (2011).[1]

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[1] With a single exception, every court of appeals to consider the issue has adopted the gross-receipts interpretation of Section 853(a)(1) and 18 U.S.C. 1963(a)(3). See, *e.g.*, *United States* v. *Christensen*, 828 F.3d 763, 822-824 (9th Cir. 2015), cert. denied, No. 16-461 (Jan. 9, 2017); *United States* v. *Bucci*, 582 F.3d 108, 121-124 (1st Cir. 2009); *United States* v. *Keeling*, 235 F.3d 533, 537 (10th Cir. 2000), cert. denied, 533 U.S. 940 (2001); *United States* v. *Simmons*, 154 F.3d 765, 770-771 (8th Cir. 1998); *United States* v. *DeFries*, 129 F.3d 1293, 1313-1314 (D.C. Cir. 1997); *McHan*, 101

Accordingly, if a drug dealer is convicted of selling a quantity of drugs for $100,000, he is liable to forfeit the entire $100,000—he cannot deduct the amount he paid for the drugs. See *United States* v. *Casey*, 444 F.3d 1071, 1076 & n.4 (9th Cir.), cert. denied, 549 U.S. 1010 (2006); *McHan*, 101 F.3d at 1041-1042. The dealer also cannot escape forfeiture by using the proceeds to buy other property, such as a car or a house. Section 853(a)(1) reaches property "derived from" criminal proceeds, so any property that can be traced to the proceeds is likewise subject to forfeiture.

Forfeiture under Section 853 is not limited to property the defendant has in his possession when he is convicted. The statute provides that "[a]ll right, title, and interest" in criminal proceeds "vests in the United States upon the commission of the act giving rise to forfeiture." 21 U.S.C. 853(c). "Any such property that is subsequently transferred to a person other than the defendant" may be ordered forfeited unless the transferee shows that he is a bona fide purchaser who acquired the property without reason to believe it was subject to forfeiture. *Ibid.* The hypothetical $100,000 thus remains subject to forfeiture even if the dealer passes it on to his supplier, pays it to his couriers, or gives it to a friend. See, *e.g.*, *Casey*, 444 F.3d at 1073-1074; *United States* v. *Hurley*, 63 F.3d 1, 21-22 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996).

3. In practice, of course, defendants have often dissipated the proceeds of their offenses by the time they are caught. And because "drug traffickers deal almost exclusively in cash and endeavor to keep the cash out of the banking system," it is often difficult if

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F.3d at 1041-1042; but see *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003).

not impossible to trace those proceeds to specific assets. Cassella § 25-5(c), at 927; see *United States* v. *Westbrook*, 119 F.3d 1176, 1192 (5th Cir. 1997), cert. denied, 522 U.S. 1119 (1998).

In 1986, Congress responded to that problem by "provid[ing] for the forfeiture of substitute assets where the proceeds of a specified crime are lost, beyond judicial reach, substantially diminished, or commingled." 132 Cong. Rec. 26,473 (1986); see Department of Justice Assets Forfeiture Fund Amendments Act of 1986, Pub. L. No. 99-570, Tit. I, § 1153, 100 Stat. 3207-13. The substitute-assets provision allows the forfeiture of "any other property of the defendant" if, as a result of any act or omission of the defendant, the directly forfeitable property "cannot be located upon the exercise of due diligence," "has been commingled with other property which cannot be divided without difficulty," or is otherwise unavailable. 21 U.S.C. 853(p); see 18 U.S.C. 1963(m).

Even if the defendant does not have substitute assets at the time of conviction, moreover, the government may obtain a money judgment for the amount of the proceeds. See Fed. R. Crim. P. 32.2(b) (providing for money judgments); see also *United States* v. *Hampton*, 732 F.3d 687, 691 (6th Cir. 2013) (collecting cases), cert. denied, 134 S. Ct. 947 (2014). Thus, if the $100,000 in drug proceeds cannot be located or traced and the defendant lacks substitute assets, the government is entitled to a $100,000 money judgment enforceable against assets he may acquire in the future. See Cassella § 19-4(c), at 691-693.

4. Section 853 applies only to drug offenses, but in the decades since its enactment Congress has authorized the forfeiture of proceeds as a penalty for many

other crimes. See, *e.g.*, 18 U.S.C. 982(a); see also 18 U.S.C. 981(a)(1) (civil proceeds forfeitures for various offenses); 28 U.S.C. 2461(c) (authorizing criminal forfeiture for any offense for which civil forfeiture is authorized). Section 853's procedures generally govern forfeitures under those statutes as well. 18 U.S.C. 982(b)(1); 28 U.S.C. 2461(c).

B. The Present Controversy

1. Petitioner and his brother ran an outdoor-gear store in Chattanooga, Tennessee. Petitioner's brother owned the store; petitioner was the manager in charge of sales and inventory. The store carried a product called "Polar Pure," an iodine-based water purifier. In addition to being a water purifier, iodine is also used to make methamphetamine. In early 2008, after noticing a growing number of "edgy looking folks" buying Polar Pure, petitioner called the Chattanooga Police Department and was warned that "Polar Pure was being used to manufacture methamphetamine throughout the community." Pet. App. 2a; see 1/22/14 Trial Tr. (Tr.) 179; 1/23/14 Tr. 355.

Despite that warning, petitioner and his brother continued to sell increasing quantities of Polar Pure to methamphetamine cooks. They sold more than 2800 bottles in 2008 and more than 13,000 bottles in 2009. Polar Pure became the store's highest-grossing item, bringing in roughly $400,000 in revenues and $270,000 in profits between 2008 and 2010. Pet. App. 2a-3a, 51a; 1/22/14 Tr. 249-252.

Petitioner and his brother kept the store's supply of Polar Pure hidden behind the counter, so that customers had to ask for it. And although each bottle contained enough iodine to purify 500 gallons of water, the brothers sold up to 12 bottles at a time to custom-

ers who returned multiple times per week. Pet. App. 2a-3a; 1/21/14 Tr. 44, 48-50, 54-72.

Between 2008 and 2010, law enforcement officers repeatedly tried to convince petitioner and his brother to stop selling Polar Pure to methamphetamine cooks, but the brothers refused. Petitioner also lied about the quantity of Polar Pure he was selling, and he later told officers that he and his brother had adopted a "don't ask don't tell policy" for iodine sales. 1/22/14 Tr. 255-256; see *id.* at 147-149, 253; Pet. App. 3a.

In November 2010, law enforcement officers executed a warrant at the store and seized its inventory of Polar Pure. Illicit methamphetamine labs using iodine—which had previously been commonplace in the area—became "fairly non-existent" after the seizure. 1/23/14 Tr. 366; see 1/22/14 Tr. 232, 253-254.

2. Petitioner and his brother were indicted on conspiracy and substantive charges of possessing and distributing chemicals, knowing they would be used to make methamphetamine. Pet. App. 3a-4a. The indictment also sought a forfeiture money judgment holding the brothers jointly and severally liable for $270,000 in proceeds. Indictment 2-3; see Pet. App. 67a (second superseding indictment).[2]

Petitioner's brother pleaded guilty and agreed to a $200,000 forfeiture money judgment. Petitioner went to trial. The jury acquitted him on three counts but convicted him on the other 11, including substantive and conspiracy charges. Pet. App. 4a, 39a.

The district court sentenced petitioner to 60 months of imprisonment. The government sought a

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[2] Although Section 853(a)(1) authorizes the forfeiture of gross receipts, in this case the government sought to forfeit only the net profits from the Polar Pure sales. Pet. App. 67a.

forfeiture money judgment of approximately $70,000, the remaining amount of the conspiracy's proceeds. The court declined to order a forfeiture, stating that petitioner was a salaried employee and that the government had not proved that he personally retained any proceeds from the iodine sales. Pet. App. 4a, 39a.

3. The court of appeals affirmed petitioner's convictions but reversed the denial of a forfeiture. Pet. App. 24a-29a. The court joined several other circuits in applying traditional principles of conspiracy liability to hold that Section 853 "mandates joint and several liability among coconspirators for the proceeds of a drug conspiracy." *Id.* at 25a-26a. The court concluded that it was bound by *United States* v. *Corrado*, 227 F.3d 543 (6th Cir. 2000), which had interpreted RICO's "virtually identical" forfeiture provision to provide for joint-and-several liability. Pet. App. 27a.

Judge Moore concurred in the judgment. She likewise concluded that the panel was bound by *Corrado*, but wrote separately to express her agreement with the D.C. Circuit's decision in *United States* v. *Cano-Flores*, 796 F.3d 83 (2015), cert. denied, 136 S. Ct. 1688 (2016), which had departed from *Corrado* and the decisions of every other circuit to consider the issue by rejecting joint-and-several co-conspirator liability. Pet. App. 29a-34a.

SUMMARY OF ARGUMENT

A conspiracy is a partnership in crime in which the conspirators are legally responsible for each other's foreseeable actions in furtherance of their common plan. Under that bedrock principle of conspiracy liability, 21 U.S.C. 853 renders the members of a drug conspiracy jointly and severally liable to forfeit the proceeds foreseeably obtained by the conspiracy as a

whole, without regard to how they divided those proceeds among themselves.

A. Because a conspiracy is a partnership in crime, each of its members is "responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013). One consequence of that principle is the familiar *Pinkerton* rule, which provides that a person who joins a conspiracy is guilty of the reasonably foreseeable substantive offenses his co-conspirators commit in furtherance of the scheme. Similar principles of conspiracy liability run throughout the criminal law, governing the treatment of conspirators under the hearsay rule, the Confrontation Clause, and the venue provisions of Article III and the Sixth Amendment. The same principles also apply in criminal sentencing.

B. Those traditional principles of conspiracy liability dictate that, when the traceable proceeds of a conspiracy are unavailable, Section 853 renders conspirators jointly and severally liable for the amount of proceeds foreseeably obtained by the conspiracy. As the overwhelming majority of the courts of appeals have recognized, that result follows directly from the understanding that the members of a conspiracy are partners who act as each other's agents. Joint-and-several liability simply treats conspirators like the members of a lawful partnership, who are likewise jointly and severally liable for the partnership's debts.

Petitioner asserts that the text of Section 853(a)(1) precludes joint-and-several liability because it requires a person convicted of a drug offense to forfeit the proceeds "the person" obtained from the offense. But when one conspirator foreseeably obtains proceeds —say, by completing a drug sale—that act is attribut-

ed to his co-conspirators as a matter of law. And Section 853(a)(1) readily encompasses such co-conspirator liability by requiring the forfeiture of proceeds the defendant obtained "indirectly."

Petitioner objects that joint-and-several liability is a tort concept that is out of place in criminal sentencing, which typically calls for individual punishment. But joint-and-several liability naturally results where, as here, multiple criminal defendants share liability for a fixed sum. For example, it was "well-settled" that courts could "impose joint and several [restitution] liability" even before Congress expressly addressed the issue in 1996. *United States* v. *Hunter*, 52 F.3d 489, 494 (3d Cir. 1995); see 18 U.S.C. 3664(h). Joint-and-several liability is equally appropriate in the forfeiture context, where the fixed measure of liability is the defendants' gain rather than the victim's loss.

C. Most of petitioner's remaining arguments for a departure from traditional principles of conspiracy liability rest on a mistaken view of Section 853's purpose and structure. Unlike traditional civil *in rem* forfeiture statutes, Section 853 is not limited to the forfeiture of specific tainted property, such as the traceable proceeds of the offense. Instead, when those traceable proceeds are not available, Section 853 makes a defendant personally liable to forfeit an equivalent amount, either in the form of substitute property or through a money judgment. 21 U.S.C. 853(p); Fed. R. Crim. P. 32.2(a) and (b). And when two or more defendants conspired to obtain the proceeds, that personal liability is joint and several.

Petitioner contends that the application of traditional principles of conspiracy liability to Section 853(a)(1) would yield anomalous results under other

provisions of Section 853—for example, by authorizing the government to freeze all of the conspirators' untainted assets before trial. But those arguments are premised on a misunderstanding of the statute, which is why none of the anomalies petitioner posits have materialized during the decades that courts have applied the rule he seeks to overturn.

Departing from traditional principles of conspiracy liability would thwart the purpose of Section 853 by undermining the "strong governmental interest in obtaining full recovery of all forfeitable assets." *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014) (citation omitted). It would mean, for example, that the conspirators could avoid forfeiture by concealing the allocation of proceeds among themselves and dissipating those proceeds before being caught.

D. Finally, petitioner's reliance on the rule of lenity and the canon of constitutional avoidance is misplaced. The rule of lenity applies only when, at the end of the process of construing a statute, the Court is left with a grievous ambiguity. It has no role to play where, as here, longstanding background principles provide a clear answer. Nor does joint-and-several liability raise concerns under the Eighth Amendment. A defendant's liability is limited to the amount of proceeds that was reasonably foreseeable to him. As decades of experience confirm, a forfeiture in that amount will rarely, if ever, be grossly disproportional to the gravity of the defendant's offense. And petitioner's Sixth Amendment avoidance argument rests on his erroneous assumption that joint-and-several liability authorizes pretrial restraints of conspirators' untainted assets.

ARGUMENT

SECTION 853 RENDERS DRUG CONSPIRATORS JOINTLY AND SEVERALLY LIABLE TO FORFEIT THE REASONABLY FORESEEABLE PROCEEDS OF THEIR CONSPIRACY

A conspiracy is a partnership in crime in which each conspirator is legally responsible for his co-conspirators' reasonably foreseeable acts in furtherance of their common scheme. That principle animates numerous aspects of criminal law—including the *Pinkerton* rule holding a member of a conspiracy liable for substantive crimes committed by his co-conspirators. See *Pinkerton* v. *United States*, 328 U.S. 640 (1946). The same principle dictates that 21 U.S.C. 853 renders the members of a drug conspiracy jointly and severally liable to forfeit the reasonably foreseeable proceeds of the conspiracy. For nearly three decades after Section 853's enactment, that rule uniformly prevailed in the courts of appeals.

Joint-and-several forfeiture liability makes sense. Just as the members of a lawful partnership are held jointly and severally liable for the partnership's debts, criminal conspirators have joint liability for the proceeds of their joint crimes. Joint-and-several liability is entirely consistent with Section 853's text and structure, and it is eminently workable in practice—as three decades of experience in the lower courts confirm. A departure from traditional principles of conspiracy liability, in contrast, would thwart Section 853's purpose by allowing conspirators to evade forfeiture by concealing the allocation of the proceeds among themselves.

A. Because A Conspiracy Is A Partnership In Crime, Conspirators Are Responsible For Each Other's Acts In Furtherance Of The Common Scheme

1. "The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). To convict a defendant of a drug or RICO conspiracy, the government must prove "that two or more people agreed to commit a crime covered by the specific conspiracy statute (that a conspiracy existed) and that the defendant knowingly and willfully participated in the agreement (that he was a member of the conspiracy)." *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013).

Once a person joins a conspiracy, he "becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith*, 133 S. Ct. at 719. So long as the "partners in the criminal plan" agree to pursue "the same criminal objective," "each is responsible for the acts of each other" even if they "divide up the work." *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997). That principle of responsibility for the acts of one's co-conspirators is rooted in the common law, which likewise recognized that "[o]ne who conspires with others to commit an unlawful act * * * is liable for the acts of each and all who participate with him in the execution of the unlawful purpose." Wm. L. Clark, Jr., *Handbook of Criminal Law* 162 (3d ed. 1915) (Clark).[3]

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[3] See 1 Joel Prentiss Bishop, *New Commentaries on the Criminal Law* § 629, at 385 (8th ed. 1892) ("When two or more persons unite to accomplish a criminal object, * * * each individual whose will contributes to the wrong-doing is in law responsible for the whole, the same as though performed by himself alone."); 3 Joseph

The principle that conspirators are legally responsible for each other's acts flows from the recognition that a conspiracy is a "partnership in crime." *Pinkerton*, 328 U.S. at 644, 646; see *United States* v. *Kissel*, 218 U.S. 601, 608 (1910) (Holmes, J.) ("A conspiracy is a partnership in criminal purposes."). The common law treated "every Partner" as "an agent of the Partnership" whose acts within the scope of the partnership bound his partners. Joseph Story, *Commentaries on the Law of Partnership* § 1, at 1 (5th ed. 1859). Modern partnership statutes reflect the same rule. See Uniform Partnership Act § 301(1) (1997). And just as each member of a lawful partnership is an agent whose acts bind his partners, "[e]ach conspirator is the agent of the other, and the acts done are therefore the acts of each and all." Clark 164; see *Pinkerton*, 328 U.S. at 646 ("[S]o long as the partnership in crime continues, the partners act for each other in carrying it forward.").

2. One consequence of that traditional principle of conspiracy liability is the familiar *Pinkerton* rule, which provides that all conspirators may be convicted of a "substantive offense" committed by a member of the conspiracy so long as that offense was reasonably foreseeable and committed "in furtherance of the

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Chitty, *A Practical Treatise on the Criminal Law* 1143a (5th Am. ed. 1847) ("Where several persons are proved to have combined together for the same illegal purpose, any act done by any of the party, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party."); John Wilder May, *The Law of Crimes* § 89, at 99 (1881) ("[E]ach is responsible for all acts of his confederates, done in pursuance of the original purpose."); see also, *e.g.*, *Collins* v. *Commonwealth*, 3 Serg. & Rawle 220, 223 (Pa. 1817); *Commonwealth* v. *Warren*, 6 Mass. (6 Tyng.) 74 (1809).

conspiracy." *Pinkerton*, 328 U.S. at 647. That rule is based on the understanding that each conspirator's "acts in furtherance of the conspiracy are * * * attributable to the others." *Ibid.* Thus, even though the other conspirators did not *personally* perform the acts meeting the elements of the substantive offense, they are guilty because the acts of their co-conspirator and agent are attributed to them.

For example, a defendant may be convicted of possessing drugs he did not possess personally, so long as it was reasonably foreseeable that his co-conspirator would possess the drugs in furtherance of the conspiracy. See, *e.g.*, *United States* v. *Solis*, 299 F.3d 420, 446-447 (5th Cir.), cert. denied, 537 U.S. 1060, and 537 U.S. 1094 (2002); *United States* v. *Navarrete-Barron*, 192 F.3d 786, 792-793 (8th Cir. 1999). The same goes for possession of a firearm. See, *e.g.*, *United States* v. *Alvarez-Valenzuela*, 231 F.3d 1198, 1201-1202 (9th Cir. 2000). And a defendant may even be convicted of a murder committed by a co-conspirator if it was reasonably foreseeable and committed in furtherance of the conspiracy—that is, if it was within the scope of the illegal partnership he agreed to join. See, *e.g.*, *United States* v. *Rosalez*, 711 F.3d 1194, 1207 (10th Cir.), cert. denied, 134 S. Ct. 240, 134 S. Ct. 336 (2013), and 134 S. Ct. 1275 (2014); *United States* v. *Curtis*, 324 F.3d 501, 506 (7th Cir.), cert. denied, 540 U.S. 998 (2003).[4]

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[4] Because the *Pinkerton* rule simply supplies an evidentiary basis for holding a defendant liable for a substantive offense committed by his co-conspirator, "a conspiracy need not be charged in order for [the rule] to apply." *United States* v. *Lopez*, 271 F.3d 472, 480-481 (3d Cir. 2001), cert. denied, 535 U.S. 908, and

3. The *Pinkerton* rule may be the best known application of the principle that a conspiracy is a partnership in which the conspirators are responsible for each other's acts, but it is far from the only one. The same principle forms the basis for the common law exception to the hearsay rule, now codified in Federal Rule of Evidence 801(d)(2)(E), that makes an out-of-court statement by one conspirator in furtherance of the conspiracy admissible against his co-conspirators. The rationale for that exception is that "conspirators are partners in crime" and that, "[a]s such, the law deems them agents of one another." *Anderson* v. *United States*, 417 U.S. 211, 218 n.6 (1974).

The same rationale applies to the forfeiture-by-wrongdoing doctrine, which provides that a defendant forfeits his rights under the Sixth Amendment's Confrontation Clause if he intentionally procures a witness's unavailability—for example, through bribery, intimidation, or murder—in order to prevent the witness from testifying. *Giles* v. *California*, 554 U.S. 353, 359-361 (2008); see Fed. R. Evid. 804(b)(6). Courts have held that a defendant likewise forfeits his confrontation rights if his co-conspirator procures a witness's unavailability for that purpose, reasoning that "traditional principles of conspiracy liability are applicable within the forfeiture-by-wrongdoing analysis." *United States* v. *Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012), cert. denied, 133 S. Ct. 1278 (2013); see *id.* at 384-385 (collecting cases).

Courts have also relied on the principle that "a conspiracy is a partnership in crime" in which "an 'overt act of one partner may be the act of all'" in applying

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535 U.S. 962 (2002); see, *e.g.*, *United States* v. *Macey*, 8 F.3d 462, 468 (7th Cir. 1993).

the venue provisions of Article III and the Sixth Amendment. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-254 (1940) (citation omitted); see *id.* at 253 (reasoning that acts "by any one of the [conspirators] in the [relevant district] bound all"); see also, *e.g.*, *United States* v. *Al-Talib*, 55 F.3d 923, 928 (4th Cir. 1995) ("[B]ecause proof of acts by one co-conspirator can be attributed to all members of the conspiracy, [one defendant's] contacts with the Eastern District of Virginia serve to establish venue for all the defendants.").

This Court has invoked the same principle in applying the statute of limitations to conspiracy offenses, reasoning that the fact that a conspiracy "may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *Kissel*, 218 U.S. at 608; see *Brown* v. *Elliot*, 225 U.S. 392, 400-401 (1912) ("[E]very overt act was the act of all the conspirators, made so by the terms and force of their unlawful plot.").

The principle that a conspiracy is a partnership in which the members act as each other's agents thus runs throughout the law's treatment of conspirators. And that principle also applies at sentencing. For example, courts consider the conduct of a defendant's co-conspirators when determining (or instructing juries to determine) the quantity of drugs that establishes the defendant's mandatory minimum sentence for a drug conspiracy. See, *e.g.*, *United States* v. *Foster*, 507 F.3d 233, 250-251 & n.10 (4th Cir. 2007), cert. denied, 552 U.S. 1274 (2008); *United States* v. *Jackson*, 335 F.3d 170, 180-181 (2d Cir. 2003); *United States* v. *Rodriguez*, 67 F.3d 1312, 1324 (7th Cir. 1995),

cert. denied, 517 U.S. 1174 (1996). And the Sentencing Guidelines attribute to a defendant the reasonably foreseeable acts of others done in furtherance of jointly undertaken criminal activity. Sentencing Guidelines § 1B1.3(a)(1)(B). That rule "closely correspond[s] to the classic statement of the common law requirements for substantive conspiracy liability," as modified by the Guidelines' focus on individual acts. *United States* v. *Spotted Elk*, 548 F.3d 641, 673 (8th Cir. 2008) (citing *Pinkerton* and Sentencing Guidelines § 1B1.3, comment. (n.1)), cert. denied, 556 U.S. 1145, 556 U.S. 1194, and 556 U.S. 1265 (2009).

B. Under Traditional Principles Of Conspiracy Liability, Section 853 Renders Conspirators Jointly And Severally Liable To Forfeit The Reasonably Foreseeable Proceeds Of Their Conspiracy

A straightforward application of traditional principles of conspiracy liability to Section 853 dictates that, when the traceable proceeds of the conspiracy are unavailable, a conspirator's liability to forfeit an equivalent sum is not limited to the amount of proceeds the government can prove he obtained personally. Instead, as courts have long recognized, each conspirator is jointly and severally liable for the amount of proceeds foreseeably obtained by the conspiracy as a whole—without regard to how the conspirators divided those proceeds among themselves.

1. Traditional principles of conspiracy liability govern the forfeiture of proceeds under Section 853

a. Section 853(a)(1) provides that "[a]ny person convicted of a violation" of specified drug laws "shall forfeit to the United States," among other things, "any property constituting, or derived from, any proceeds

the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. 853(a)(1). If the specific property constituting the proceeds cannot be located or traced to other property, the defendant must forfeit substitute assets or be subject to a money judgment equal to the value of the proceeds. See 21 U.S.C. 853(p); Fed. R. Crim. P. 32.2(b).

Section 853 does not expressly address the scope of a co-conspirator's liability for forfeiture, but background principles of conspiracy liability inform the application of the statute in this context. Cf. *Burrage* v. *United States*, 134 S. Ct. 881, 889 (2014) (relying on "traditional background principles 'against which Congress legislates'") (brackets and citation omitted). As in other conspiracy settings, courts have long applied "the familiar rule that a member of a conspiracy is responsible for the foreseeable acts of other members of the conspiracy taken in furtherance of the conspiracy." *United States* v. *Hurley*, 63 F.3d 1, 22 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996). Under that rule, a defendant is liable for the amount of proceeds foreseeably obtained by the conspiracy as a whole, not just the proceeds he obtained personally. *Ibid.*; see Cassella § 19-5, at 700-703. Because each conspirator is "responsible for the acts of his co-conspirators in pursuit of their common plot," *Smith*, 133 S. Ct. at 719, each conspirator is liable for the proceeds foreseeably obtained by his co-conspirators.

That approach to forfeiture liability treats an unlawful conspiracy on a par with its lawful counterpart: a partnership. In a partnership, the general rule is that "[a]ll partners are liable jointly and severally for all obligations of the partnership," whether or not they incurred those liabilities through their own acts.

Uniform Partnership Act § 306(a); see, *e.g.*, *United States* v. *Galletti*, 541 U.S. 114, 116 (2004). Joint-and-several forfeiture liability treats criminal conspirators in the same way. "[M]uch like in a lawful partnership, 'the proceeds of a conspiracy are a debt owed by each of the conspirators,' regardless of the portion of those proceeds that each member received." *United States* v. *Beecroft*, 825 F.3d 991, 998 n.6 (9th Cir. 2016) (quoting *United States* v. *Spano*, 421 F.3d 599, 603 (7th Cir. 2005), cert. denied, 546 U.S. 1095, and 546 U.S. 1122 (2006)). That result is eminently sensible. Indeed, "[i]t would be absurd to treat [criminal conspirators] more leniently than the law treats a lawful partnership." *Spano*, 421 F.3d at 603.

b. Until 2015, courts applying Section 853 and the parallel provisions of 18 U.S.C. 1963 "ha[d] unanimously concluded that conspirators are jointly and severally liable for amounts received pursuant to their illicit agreement." *United States* v. *McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997). In all, that rule was adopted by nine circuits beginning shortly after those provisions were enacted in 1984. See, *e.g.*, *United States* v. *Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999), cert. denied, 529 U.S. 1055 (2000); *United States* v. *Benevento*, 836 F.2d 129, 130 (2d Cir. 1988); *United States* v. *Pitt*, 193 F.3d 751, 765-766 (3d Cir. 1999); *McHan*, 101 F.3d at 1043 (4th Cir.); *United States* v. *Edwards*, 303 F.3d 606, 643-644 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003); *United States* v. *Corrado*, 227 F.3d 543, 553 (6th Cir. 2000); *United States* v. *Masters*, 924 F.2d 1362, 1369-1370 (7th Cir.), cert. denied, 500 U.S. 919, and 502 U.S. 823 (1991); *United States* v. *Elder*, 682 F.3d 1065, 1073 (8th Cir. 2012); *United States* v.

Browne, 505 F.3d 1229, 1279-1280 (11th Cir. 2007), cert. denied, 554 U.S. 918 (2008); see also *United States* v. *Caporale*, 806 F.2d 1487, 1507-1508 (11th Cir. 1986) (applying joint-and-several liability to a predecessor provision), cert. denied, 482 U.S. 917, and 483 U.S. 1021 (1987). Only the D.C. Circuit has rejected that rule, and it acknowledged that it was departing from the consensus view of other courts of appeals. *United States* v. *Cano-Flores*, 796 F.3d 83, 91 (2015), cert. denied, 136 S. Ct. 1688 (2016).[5]

The prevailing understanding of co-conspirator liability under Section 853 and 18 U.S.C. 1963 is correct. Indeed, it is reflected in the advisory committee notes to the relevant Federal Rule of Criminal Procedure, which recognize that "[c]riminal defendants may be jointly and severally liable for the forfeiture of the entire proceeds of the criminal offense." Fed. R. Crim. P. 32.2(c) advisory committee's note (2000 Amendments). And in the decades between the enactment of Section 853 and 18 U.S.C. 1963 and the D.C. Circuit's decision in *Cano-Flores*, Congress repeatedly revisited those provisions without disturbing the lower courts' then-uniform conclusion that joint-and-several

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[5] Most courts of appeals have held that forfeiture liability is limited to the amount of proceeds that was "reasonably foreseeable" to the defendant. See, *e.g.*, *Hurley*, 63 F.3d at 22; *United States* v. *Contorinis*, 692 F.3d 136, 147 (2d Cir. 2012). The Eleventh Circuit, in contrast, has stated that in some circumstances a conspirator could be required to forfeit the proceeds of the conspiracy even if those proceeds were not reasonably foreseeable. See *Browne*, 505 F.3d at 1279-1280; but see *United States* v. *Seher*, 562 F.3d 1344, 1372 (11th Cir. 2009) (appearing to endorse a "reasonably foreseeable" limitation).

liability applies.[6] During the same period, Congress also provided for criminal forfeiture of the proceeds of other offenses under the procedures set forth in Section 853. See Combatting Terrorism Financing Act of 2005, Pub. L. No. 109-177, Tit. IV, § 410, 120 Stat. 246 (enacting 28 U.S.C. 2461(c)). Those provisions, too, have been interpreted to impose joint-and-several liability. See, *e.g.*, *Beecroft*, 825 F.3d at 998 n.6; *United States* v. *Mandell*, 752 F.3d 544, 554 (2d Cir. 2014), cert. denied, 135 S. Ct. 1402 (2015).

2. Section 853(a)(1)'s text readily encompasses traditional principles of conspiracy liability

Petitioner contends (Br. 10-13) that the text of Section 853(a)(1) resolves this case in his favor because it requires a person convicted of a specified drug offense to forfeit "any property constituting, or derived from, any proceeds *the person* obtained, directly or indirectly, as the result of such violation." 21 U.S.C. 853(a)(1) (emphasis added). On petitioner's view, that language limits forfeiture to proceeds that the defendant obtained *personally*. That is incorrect for two reasons.

First, petitioner's argument ignores the well-established principle that the foreseeable acts of each member of a conspiracy are attributed to the other conspirators as a matter of law. Under that principle, when one conspirator foreseeably obtains proceeds—say, by completing a drug sale—that act is attributed to his co-conspirators. Exactly the same logic under-

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[6] See, *e.g.*, Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, Tit. VII, § 743(a), 120 Stat. 272; International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001, Pub. L. No. 107-56, Tit. III, § 319(d), 115 Stat. 314; Methamphetamine Anti-Proliferation Act of 2000, Pub. L. No. 106-310, Tit. XXXVI, § 3613, 114 Stat. 1229-1230.

lies every application of the *Pinkerton* rule. For example, 21 U.S.C. 841(a)(1) makes it unlawful for "any person" to possess with intent to distribute a controlled substance. On petitioner's view (Br. 11), the "plain text" of that statute would limit liability to the "person" who physically possesses the drugs. But under *Pinkerton*, a member of a conspiracy is legally responsible for the foreseeable acts of his co-conspirators, and it is thus hornbook law that one conspirator may be convicted of possessing with intent to distribute drugs that were physically possessed only by his co-conspirator. See, *e.g.*, *Solis*, 299 F.3d at 446-447; *Navarrete-Barron*, 192 F.3d at 792-793. The same is true under Section 853(a)(1): Even if only one member of the conspiracy *personally* obtains the proceeds from a given sale, that act is attributed to his co-conspirators so long as it is reasonably foreseeable.

Second, the broad text of Section 853(a)(1) readily encompasses traditional principles of conspiracy liability by requiring forfeiture of proceeds the defendant obtained "directly *or indirectly*." 21 U.S.C. 853(a)(1) (emphasis added). The purpose of the phrase "or indirectly" is "to make clear that a person does not have to take personal, physical possession of the proceeds to 'obtain' them." Cassella § 25-4(f), at 920. For example, "a defendant 'obtains' fraud proceeds indirectly if he directs them to a corporation that he controls or that serves as his *alter ego*." *Id.* at 920-921. And just as a defendant obtains proceeds indirectly when they go to his lawful agent or alter ego, he also obtains proceeds indirectly when they go to the criminal enterprise of which he is a part, and in which all members are each other's agents. Section 853(a)(1) thus "is not limited to property that the defendant

acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him." *McHan*, 101 F.3d at 1043.

Petitioner concedes (Br. 12) that even if a defendant does not obtain proceeds personally, he obtains them "indirectly"—and thus is liable to forfeit them—if they go to "entities or people under the defendant's control." Petitioner would thus presumably concede that a defendant must forfeit proceeds obtained by a lawful partnership of which he is a member, or by his agent. The same rule applies when the proceeds are obtained by the defendant's criminal partnership or by his co-conspirators, who "the law deems" to be his "agents." *Anderson*, 417 U.S. at 218 n.6.

3. Petitioner identifies no sound reason to disregard traditional principles of conspiracy liability in the forfeiture context

a. Petitioner asserts (Br. 47-50) that courts of appeals have erred in applying traditional principles of conspiracy liability to forfeitures. Focusing exclusively on the *Pinkerton* rule governing liability for a co-conspirator's crimes, he asserts (Br. 49) that "*Pinkerton* was laser focused on substantive liability—*i.e.*, the conviction itself"—rather than on the consequences of a conviction, including forfeiture. See *Cano-Flores*, 796 F.3d at 94-95. That argument confuses *Pinkerton*'s specific result with its underlying rationale.

The *Pinkerton* rule is just one application of the principle that a person who joins a conspiracy "becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *Smith*, 133 S. Ct. at 719; see *Pinkerton*, 328 U.S. at 646-647. *Pinkerton* applied that principle to hold that the members of a conspiracy are liable for each other's substantive

offenses because their actions are attributed to each other. 328 U.S. at 647-648. But the same principle also operates in many other contexts—including at sentencing and in applying the hearsay rules, the Confrontation Clause, and the Constitution's venue provisions. See pp. 17-19, *supra*.

The principle that a conspiracy is a partnership in which the conspirators act as each other's agents applies equally to Section 853. Indeed, because the members of conspiracy "are substantively liable for the foreseeable criminal conduct of the other members" and are likewise sentenced based on "the foreseeable conduct of co-conspirators," "[i]t would be odd * * * to depart from this principle of attributed conduct when it comes to apply the forfeiture rules, which have aspects both of substantive liability and of penalty." *Hurley*, 63 F.3d at 22. And it would be particularly odd to conclude that a defendant can be held liable for first-degree murder under a *Pinkerton* theory, see, *e.g.*, *Rosalez*, 711 F.3d at 1207, and can be convicted for possession of drugs by his co-conspirators, yet cannot be held responsible in forfeiture for proceeds foreseeably obtained by his co-conspirators when they convert the same drugs to cash.

b. Petitioner also objects (Br. 51-53) that joint-and-several forfeiture liability is inconsistent with the *Pinkerton* rule because *Pinkerton* liability results in individual convictions and sentences rather than shared liability. Co-conspirators convicted of distributing five kilograms of cocaine are not, for example, jointly and severally liable to serve the ten-year prison term prescribed by 21 U.S.C. 841(b)(1)(A). But again, the underlying principle is the same: Each conspirator is legally responsible for the acts of his

confederates. That responsibility results in individual prison sentences and fines, which are based on the circumstances of each defendant. See 18 U.S.C. 3553, 3572. Criminal forfeiture is also "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti* v. *United States*, 516 U.S. 29, 39 (1995). But unlike a fine or prison sentence, it is based on a fixed benchmark: The government is entitled to recover the full amount of the proceeds of the conspiracy, but no more. The fact that multiple conspirators are responsible for the same proceeds thus yields the rule of joint-and-several liability: "The government can collect [the proceeds of a conspiracy] only once but, subject to that cap, it can collect from any [conspirator] so much of that amount as was foreseeable to that [conspirator]." *Hurley*, 63 F.3d at 23.

Similar principles apply to restitution, another aspect of criminal sentencing governed by a specific monetary benchmark—the victim's loss. Before 1996, district courts had discretion to order "that the defendant make restitution to any victim" of a criminal offense. 18 U.S.C. 3663(a)(1) (1994); see 18 U.S.C. 3664(a) (1994). It was "well-settled" that courts could "impose joint and several [restitution] liability on multiple defendants." *United States* v. *Hunter*, 52 F.3d 489, 494 (3d Cir. 1995); see *id.* at 494-495 (collecting cases). As in the forfeiture context, courts reached that conclusion by applying the "well-established" rule that every conspirator "is legally liable for all the actions of her co-conspirators in furtherance of th[e] crime." *United States* v. *Chaney*, 964 F.2d 437, 453 (5th Cir. 1992).[7]

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[7] Those pre-1996 decisions did not mandate joint-and-several liability because the applicable statutes made awards of restitution

In 1996, Congress made restitution mandatory for many offenses, 18 U.S.C. 3663A, but provided that a court may opt to "apportion liability among the defendants" rather than making "each defendant liable for payment of the full amount," 18 U.S.C. 3664(h). See Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, § 206, 110 Stat. 1234. That confirms that Congress knows how to *depart* from traditional principles of conspiracy liability when it wishes to do so, as it did in Section 3664(h) by allowing courts to apportion restitution liability rather than making it joint and several. But Congress has not departed from traditional principles of conspiracy liability for forfeitures under Section 853. And the availability of joint-and-several restitution liability both before and after the enactment of Section 3664(h) shows that there is nothing anomalous about holding criminal defendants jointly and severally liable for a fixed sum.[8]

c. Petitioner asserts (Br. 36-38) that joint-and-several liability is a tort-law concept that applies only to compensatory payments. See *Cano-Flores*, 796 F.3d at 95. Again, he is mistaken. Joint-and-several liabil-

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discretionary and allowed courts to consider factors including "the financial resources of the defendant" in deciding "whether to order restitution" and "the amount of such restitution." 18 U.S.C. 3664(a) (1994).

[8] Petitioner draws the wrong inference from Section 3664(h) because he assumes (Br. 39-40) that an explicit statutory provision was necessary to *authorize* courts to impose joint-and-several restitution liability. In fact, it was "well-settled" that courts had that authority before Section 3664(h) was enacted. *Hunter*, 52 F.3d at 494. Section 3664(h) was instead enacted to give courts discretion to *depart* from joint-and-several liability under the mandatory restitution scheme adopted in 1996.

ity simply describes a rule under which "each individual remains responsible for payment of the entire liability, so long as any part is unpaid." *United States* v. *Scop*, 940 F.2d 1004, 1010 (7th Cir. 1991); see *Black's Law Dictionary* 966 (10th ed. 2014). Such liability is not limited to compensating a tort victim's loss—it also applies, for example, to the debts of a partnership. See pp. 20-21, *supra*. And in another example of particular relevance to the forfeiture of criminal proceeds, the well-established practice of equity courts was to impose joint-and-several liability when ordering the disgorgement of illicit profits. See, *e.g.*, *Crites, Inc.* v. *Prudential Ins. Co.*, 322 U.S. 408, 414 (1944) (breach of receiver's duty to estate would warrant an order to "disgorge[]" profits, "including the profits of others who knowingly joined him in pursuing an illegal course of action"); *Jackson* v. *Smith*, 254 U.S. 586, 589 (1921) ("[O]thers who knowingly join a fiduciary in [an illegal] enterprise likewise become jointly and severally liable with him for such profits."); see also 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* § 1081, at 231-232 (5th ed. 1941).

Petitioner is likewise wrong to assert (Br. 38) that joint-and-several liability is appropriate only where a defendant who is made to pay more than his proportionate share of the debt has a right "to obtain contribution from others in proportion to their fault." In fact, the traditional rule was that intentional wrongdoers held jointly and severally liable to pay damages or disgorge profits *did not* enjoy a right of contribution. See Restatement (Second) of Torts § 886A(3) (1979); Restatement (First) of Trusts § 258(2) (1935); see also Restatement (Third) of Torts: Apportion-

ment of Liability § 23, reporters' note to cmt. *l* (2000) (reflecting a different rule but acknowledging that "the law in most states" continues to deny a right of contribution to intentional tortfeasors). The absence of a right of contribution for conspirators required to forfeit criminal proceeds thus provides no sound reason to depart from the traditional principle that each member of a conspiracy is legally responsible for the acts of his confederates.[9]

C. Petitioner's Remaining Arguments For A Departure From Traditional Principles Of Conspiracy Liability Rest On A Misunderstanding Of Section 853's Purpose, Structure, And Practical Operation

Petitioner devotes the bulk of his brief (Br. 13-40) to a series of arguments intended to demonstrate that the application of traditional principles of conspiracy liability would be inconsistent with Section 853's purpose and structure, and would yield anomalous results. Those arguments rest largely on two related errors about Section 853's purpose and practical operation. Petitioner begins with the premise (*e.g.*, Br. 13) that Section 853 is limited to the forfeiture of "*tainted*

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[9] In arguing otherwise, petitioner relies (Br. 38) on this Court's decision in *Paroline* v. *United States*, 134 S. Ct. 1710 (2014), which noted the absence of a federal right to contribution in holding that Congress did not make every possessor of an image of child pornography jointly and severally liable for the victim's "entire losses." *Id.* at 1725. But *Paroline* rejected such liability primarily because that case "d[id] not involve a set of wrongdoers acting in concert" and because joint-and-several liability would have made a single defendant liable for the combined consequences of the acts of "tens of thousands" of "independently acting offenders." *Ibid.* No such incongruity exists in applying the familiar rule that the confederates in a single conspiracy are responsible for each other's foreseeable acts in furtherance of their joint criminal enterprise.

assets," and he therefore assumes that holding conspirators jointly and severally liable for a forfeiture money judgment entails treating all assets that might be used to satisfy the judgment *as if* they were tainted. Section 853 does contain provisions intended to preserve and recover specific tainted property (here, the traceable proceeds of the offense). But if that tainted property is not available, Section 853 permits the forfeiture of substitute assets and the imposition of money judgments. Those remedies do not trigger the provisions directed at preserving or recovering tainted assets—which is why the anomalies petitioner posits have never come to pass during the decades that courts have applied traditional principles of conspiracy liability to Section 853.

1. Section 853 is not limited to the forfeiture of specific tainted property

Petitioner starts from the premise (Br. 13) "that what is subject to forfeiture [under Section 853(a)(1)] is *tainted* assets—the actual property constituting, or derived from, the proceeds of drug crimes." See, *e.g.*, Br. 6, 7, 16, 23, 24, 26, 28, 29, 37. Petitioner is correct that Section 853(a)(1) provides for the forfeiture of the traceable proceeds of the offense. But unlike civil *in rem* forfeiture provisions, Section 853 is not *limited* to the forfeiture of tainted property. Instead, if that property is not available, Section 853 makes a defendant personally liable to forfeit an equivalent amount.

a. Section 853(a)(1) defines the property subject to forfeiture as "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly," as a result of the offense. If, for example, a person sells a quantity of drugs for $100,000 in cash, the $100,000 in currency—or any asset traceable to

it—is subject to forfeiture. So long as that tainted property is available, the government must forfeit *that property*, and it cannot forfeit the defendant's untainted assets or obtain a money judgment. See *United States* v. *Zorrilla-Echevarría*, 723 F.3d 298, 298-300 (1st Cir. 2013).

In the usual case, however, the defendant has "already dissipated the proceeds of his offense" by the time he is caught, and those proceeds cannot be traced to other assets. Cassella § 25-6, at 935. That is particularly true because Section 853(a)(1) requires the forfeiture of "all gross receipts" from the offense, *United States* v. *Olguin*, 643 F.3d 384, 399 (5th Cir.), cert. denied, 565 U.S. 956, and 565 U.S. 958 (2011), and because it requires forfeiture of any proceeds the defendant "obtained" during the crime—even if he then passed them along to someone else, see *United States* v. *Casey*, 444 F.3d 1071, 1073 (9th Cir.), cert. denied, 549 U.S. 1010 (2006).

In the typical case in which the traceable proceeds are not available, Section 853(a)(1) authorizes the government to recover the *amount* of the proceeds through the forfeiture of specific substitute assets under Section 853(p). See, *e.g.*, *United States* v. *Chittenden*, No. 14-4768, 2017 WL 414122, at *11 (4th Cir. Jan. 31, 2017). Alternatively, the government may obtain a forfeiture money judgment. See *United States* v. *Hampton*, 732 F.3d 687, 691 (6th Cir. 2013), cert. denied, 134 S. Ct. 947 (2014).[10] Those remedies are

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[10] Every court of appeals to consider the question has held that Section 853 authorizes a forfeiture money judgment, and such judgments are contemplated in Federal Rule of Criminal Procedure 32.2(a) and (b). See *Hampton*, 732 F.3d at 691 (describing the "unanimous and growing consensus among the circuits" that

available because, unlike civil *in rem* forfeiture, "criminal forfeiture is a sanction against the individual defendant rather than a judgment against the property itself." *United States* v. *Hall*, 434 F.3d 42, 59 (1st Cir. 2006).

b. The same rules apply in a conspiracy case. If three defendants conspire to sell a quantity of drugs for $100,000, then the $100,000 in currency (or any asset traceable to it) is subject to forfeiture under Section 853(a)(1). If that tainted property is available, the government must forfeit that property. But if the specific tainted assets are no longer available, then the government may obtain the forfeiture of substitute property or a forfeiture money judgment of $100,000. And because the conspirators are legally responsible for each other's acts, they are jointly and severally liable for that amount—the government need not prove the amount of the dissipated proceeds each of them received.

Consistent with this understanding, the decisions imposing joint-and-several liability on the members of a conspiracy involve forfeiture money judgments or the forfeiture of substitute assets, not the forfeiture of

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Section 853 authorizes "a personal money judgment forfeiture"). Some courts locate the authority for money judgments in Section 853(p)'s provision for the forfeiture of substitute property. See, *e.g.*, *United States* v. *Smith*, 656 F.3d 821, 827 (8th Cir. 2011), cert. denied, 565 U.S. 1218 (2012). Others hold that Section 853(p) applies only when the government seeks to forfeit specific substitute assets, and not when it seeks a money judgment. See, *e.g.*, *United States* v. *Newman*, 659 F.3d 1235, 1242-1243 (9th Cir. 2011), cert. denied, 132 S. Ct. 1817 (2012); see also *United States* v. *Ginsburg*, 773 F.2d 798, 800-803 (7th Cir. 1985) (en banc) (holding that an earlier version of 18 U.S.C. 1963 authorized money judgments), cert. denied, 475 U.S. 1011 (1986).

specific tainted property. See, *e.g.*, *Elder*, 682 F.3d at 1072; *United States* v. *Roberts*, 660 F.3d 149, 165 (2d Cir. 2011), cert. denied, 555 U.S. 1238 (2012); *Browne*, 505 F.3d at 1279-1280; *Spano*, 421 F.3d at 602-603; *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003); *Edwards*, 303 F.3d at 643-644; *Corrado*, 227 F.3d at 553; *Candelaria-Silva*, 166 F.3d at 44; *Pitt*, 193 F.3d at 765; *United States* v. *Simmons*, 154 F.3d 765, 769-770 (8th Cir. 1998); *McHan*, 101 F.3d at 1042-1043; *Hurley*, 63 F.3d at 22; *Masters*, 924 F.2d at 1369-1370; *Benevento*, 836 F.2d at 130 & n.1.

c. Petitioner thus errs in asserting (Br. 23-29) that joint-and-several liability should be rejected because it is inconsistent with the "200-year plus tradition of forfeiture law" that focused on specific tainted assets. Br. 23. As petitioner concedes (Br. 25), the traditional forfeitures to which he refers were civil *in rem* proceedings that, by definition, focused on specific tainted property and imposed no personal liability of any kind. Section 853(a)(1) was a sharp departure from that tradition. The very concept of *in personam* criminal forfeiture was "unknown in the federal system" until 1970. *Alexander* v. *United States*, 509 U.S. 544, 563 (1993) (Kennedy, J., dissenting). And the "idea of forfeiting the proceeds of crime" was also "entirely new" when Congress introduced it in modern forfeiture statutes. Cassella § 2-4, at 33. The fact that joint-and-several liability for *in personam* proceeds forfeitures is inconsistent with the tradition of *in rem* civil forfeitures is thus no surprise—and provides no reason to upset the lower courts' longstanding view that joint-and-several liability is appropriate.

2. *Holding conspirators jointly and severally liable on forfeiture money judgments does not treat their untainted assets like tainted property*

Petitioner contends (Br. 16-21) that the application of joint-and-several liability would render 21 U.S.C. 853(c) and (e) "nonsensical" because those provisions apply only to specific tainted assets and could not sensibly apply to the untainted assets that might be used to satisfy a forfeiture money judgment. Br. 17. But petitioner is wrong to assume that joint-and-several liability requires the application of those provisions to a defendant's untainted assets—which is why the courts that have applied joint-and-several liability for decades have not reached the "nonsensical" results petitioner posits.

Sections 853(c) and (e) are designed to preserve or recover the traceable proceeds of the offense. Section 853(c) provides that "[a]ll right, title, and interest in property described in subsection (a) vests in the United States" upon the commission of the offense. If, for example, a defendant sells a quantity of drugs for $100,000, the government's title vests in those specific bills, and in any assets derived from those bills. That rule allows the government to recover tainted assets following a conviction even if they are transferred to a third party. Section 853(e) allows the government to obtain "a restraining order or injunction * * * to preserve the availability of property described in subsection (a) for forfeiture." That provision allows the government to obtain an order barring the defendant from dissipating the proceeds of the offense before trial, to ensure that they will be available for forfeiture following a conviction. See *United States* v. *Monsanto*, 491 U.S. 600, 603-604, 612-614 (1989).

By their terms, Sections 853(c) and (e) are limited to property "described in" Section 853(a)—that is, to the traceable proceeds of the offense. See *Luis* v. *United States*, 136 S. Ct. 1083, 1091-1092 (2016) (opinion of Breyer, J.). Those provisions thus do not apply to substitute assets the government could recover under Section 853(p), which by definition reaches "*other* property of the defendant" if the property "described in subsection (a)" is not available. 21 U.S.C. 853(p) (emphasis added). And Sections 853(c) and (e) likewise do not apply to untainted assets that a defendant might use to satisfy a forfeiture money judgment. Such a judgment does not refer to specific assets at all—it simply reflects the amount of monetary punishment imposed in lieu of the forfeiture of specific assets. See Fed. R. Crim. P. 32.2 advisory committee's note (2000 Amendments) ("A money judgment is an *in personam* judgment against the defendant and not an order directed at specific assets.").

Petitioner thus errs in assuming (Br. 16-21) that holding conspirators jointly and severally liable to satisfy a money judgment or to forfeit substitute property vests title to their untainted assets in the government under Section 853(c) or renders those assets subject to pretrial restraint under Section 853(e).

3. Traditional principles of conspiracy liability do not require joint-and-several liability under Sections 853(a)(2) and (3)

Petitioner also contends (Br. 13-16) that conspirators should not be jointly and severally liable to forfeit the proceeds of the conspiracy under Section 853(a)(1) because "[a]bsurd results" would follow if joint-and-several liability were applied to Sections 853(a)(2) and (3). Br. 14. But traditional principles of conspiracy

liability do not require joint-and-several liability under those provisions, which serve different functions and contain different language.

Section 853(a)(2) requires a person convicted of a qualifying offense to forfeit "any of the person's property used, or intended to be used * * * to commit, or to facilitate the commission of, [the crime]." Section 853(a)(3) requires a person convicted of engaging in a "continuing criminal enterprise" in violation of 21 U.S.C. 848 to forfeit "any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise." Unlike Section 853(a)(1), those provisions are tied to *ownership* of specified property or interests—not to the *act* of obtaining proceeds. And while it is well-established that all members of a conspiracy are legally responsible for each other's acts, no comparable rule treats conspirators as owners of each other's property.

Consistent with that understanding, the courts of appeals that have applied joint-and-several liability to Section 853(a)(1) have not extended such liability to Sections 853(a)(2) and (3). Petitioner's assertion that joint-and-several liability would be anomalous if applied to those provisions thus provides no reason to reject its well-settled application to Section 853(a)(1).

4. The application of traditional principles of conspiracy liability furthers Section 853's purpose

Finally, petitioner contends (Br. 29-40) that the application of traditional principles of conspiracy liability frustrates Section 853's purpose. In fact, the opposite is true.

a. Congress enacted Section 853 to "punish wrongdoing, deter future illegality, and 'lessen the economic

power' of criminal enterprises." *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014) (quoting *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 630 (1989)). Recognizing that a conviction of drug defendants or racketeers that leaves intact their "economic power bases" is of "only limited effectiveness," Congress designed forfeiture provisions to "strip these offenders * * * of their economic power." Senate Report 191. And Congress was particularly concerned that existing forfeiture provisions "fail[ed] adequately to address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction." *Id.* at 195.

A requirement that the government "determine the precise allocation" of proceeds among conspirators would recreate a version of the same problem, allowing the conspirators to "mask the allocation of the proceeds" and thereby "avoid forfeiting them altogether." *Caporale*, 806 F.2d at 1508. Denying forfeiture because "the government cannot prove exactly which defendant received how much of the pot" would "defeat[] the purpose of the [forfeiture] provision." *Ibid.* And that problem would often occur, because "it is unlikely that [a] criminal organization will have well-maintained and accurate files of proportional participation in the group." *United States* v. *Beneventto*, 663 F. Supp. 1115, 1118 (S.D.N.Y. 1987), aff'd, 836 F.2d 129 (1988). A departure from traditional principles of conspiracy liability would thus thwart the "strong governmental interest in obtaining full recovery of all forfeitable assets." *Kaley*, 134 S. Ct. at 1094 (citation omitted).[11]

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[11] Petitioner contends (Br. 54-55) that Section 853(d) solves this problem because it creates a "rebuttable presumption" that a

In minimizing the government's interest in collecting forfeitures in full, petitioner overlooks the remedial aspects of forfeiture under Section 853, RICO, and the other provisions subject to criminal proceeds forfeitures. Although petitioner states (Br. 8) that forfeited funds "do not compensate victims," this Court has recognized that the government's interest in forfeiture "includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it." *Caplin & Drysdale*, 491 U.S. at 629. Forfeited property is used to "recompense victims" and to "improve conditions in crime-damaged communities." *Kaley*, 134 S. Ct. at 1094. "Realistically, a victim's hope of getting paid may rest on the government's superior ability to collect and liquidate a defendant's assets" through criminal forfeiture. *United States* v. *Blackman*, 746 F.3d 137, 143 (4th Cir. 2014). For example, between 2002 and 2015, the Department of Justice returned more than $4 billion in forfeited funds to crime victims.[12]

b. Petitioner hypothesizes (Br. 30-31) that holding co-conspirators liable for the reasonably foreseeable

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defendant's property is subject to forfeiture if the government can show that it was acquired during the offense (or shortly thereafter) and that "there was no likely source for such property" other than the offense. 21 U.S.C. 853(d). But that presumption offers no help when, as is often the case, the defendants have entirely dissipated or concealed the proceeds of the offense, or when a lack of accurate records makes it impossible to know when the defendants' assets were acquired.

[12] Dep't of Justice, *Justice Department Returned Over $4 Billion to Victims of Crime Through the Asset Forfeiture Program Between 2002 and 2015* (Apr. 22, 2015), https://www.justice.gov/opa/pr/justice-department-returned-over-4-billion-victims-crime-through-asset-forfeiture-program.

proceeds of the offense could allow a drug "kingpin" to retain the tainted profits of a conspiracy while low-level couriers are made to forfeit their untainted assets. But he identifies no case where such a result has occurred. In fact, joint-and-several liability becomes significant only when the traceable proceeds of the offense are not available. Moreover, the "kingpin" in petitioner's scenario would be more likely to have assets available to satisfy a forfeiture obligation—and would face greater forfeiture liability in the first place, because more of the conspiracy's proceeds would be foreseeable to him than to low-level couriers.

Indeed, basing forfeiture liability on the amount of proceeds that was reasonably foreseeable yields more sensible results than an alternative based on the amount the defendant obtained personally. The proceeds subject to forfeiture under Section 853(a)(1) include not just the profits a defendant ultimately keeps for himself, but also any money or other property he receives as result of the offense—even if he passes it along to someone else. See, *e.g.*, *Casey*, 444 F.3d at 1073. Petitioner's interpretation would thus give "conclusive weight" to whether a particular co-conspirator "physically handled the money." *Hurley*, 63 F.3d at 22. It would mean, for example, that petitioner's hypothetical low-level couriers would be subject to greater forfeitures than "higher level" conspirators who played larger roles in the offense, but handled less of the cash. *Ibid.* Rather than fixing the amount of forfeiture based on whether an individual conspirator happened to physically possess the proceeds at some point during the offense—a fact that may be "largely fortuitous"—the amount of proceeds

foreseeable to the particular defendant "represents the sounder measure of liability." *Ibid.*

D. Neither The Rule Of Lenity Nor The Canon Of Constitutional Avoidance Justifies A Departure From Traditional Principles Of Conspiracy Liability

Petitioner contends (Br. 41-47) that the rule of lenity and the need to avoid questions under the Eighth and Sixth Amendments justify a departure from traditional principles of conspiracy liability in Section 853(a)(1). He is mistaken.

1. The rule of lenity applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (citations omitted), or an "equipoise of competing reasons [that] cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). This is not such a case, because the established principle that conspirators are legally responsible for each other's acts provides a clear answer. Such background legal principles are among "the ordinary canons of statutory construction" that may preclude resort to the rule of lenity. *Lockhart* v. *United States*, 136 S. Ct. 958, 968 (2016); see, *e.g.*, *Salinas*, 522 U.S. at 63-66 (declining to apply the rule of lenity after construing a statute based on "well-established principles" of conspiracy law); *United States* v. *Shabani*, 513 U.S. 10, 15-17 (1994) (similar).

In arguing otherwise, petitioner suggests (Br. 42) that the rule of lenity would permit co-conspirator liability only if Congress expressly provided for it. But Congress need not specifically provide for co-conspirator liability in each new federal criminal stat-

ute; instead, "the liability of coconspirators is a well-entrenched feature of federal criminal law" that Congress is presumed to incorporate absent some indication to the contrary. *United States* v. *Lake*, 472 F.3d 1247, 1266 (10th Cir. 2007).

2. Petitioner also errs in contending (Br. 43-45) that applying traditional principles of conspiracy liability to proceeds forfeitures under Section 853(a)(1) would raise constitutional concerns under the Eighth Amendment's prohibition on excessive fines.

"[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States* v. *Bajakajian*, 524 U.S. 321, 334 (1998). The application of traditional principles of conspiracy liability is consistent with that standard because proceeds obtained by other conspirators are attributable to the defendant "only to the extent that they were reasonably foreseeable to th[at] particular defendant." *Hurley*, 63 F.3d at 22. That is the standard that determines when a conspirator could be convicted and punished for his confederates' substantive crimes. See *Pinkerton*, 328 U.S. at 647-648. The attribution of the foreseeable proceeds of the conspiracy to an individual defendant will thus rarely, if ever, yield a forfeiture that is "grossly disproportional" to the gravity of his offense. To the contrary, "holding a defendant liable for an amount of money foreseeably [obtained] by himself and his own co-conspirators is quite rational based on a proportionality analysis." *Hurley*, 63 F.3d at 23.

In arguing otherwise, petitioner asserts (Br. 43) that the application of joint-and-several liability "will raise case after doubtful case" under the Eighth

Amendment. But joint-and-several liability has been the law in most of the country for decades, and petitioner musters only one example of a case raising Eighth Amendment concerns—the exceedingly unusual forfeiture order in *Cano-Flores*, which involved "one of the largest and most infamous drug cartels in Mexico." 796 F.3d at 85. In more typical cases, courts have routinely rejected Eighth Amendment challenges to forfeitures based on joint-and-several liability.[13]

In an unusual case in which "a defendant played a truly minor role in a conspiracy that [foreseeably] generated vast proceeds, joint and several liability for those proceeds *might* result in a forfeiture order grossly disproportional to the individual defendant's offense." *United States* v. *Jalaram, Inc.*, 599 F.3d 347, 355 (4th Cir. 2010) (emphasis added). In such cases, the Eighth Amendment's Excessive Fines Clause serves as a safeguard that prevents the imposition of excessive forfeitures. But the possibility of such cases does not warrant application of the canon of constitutional avoidance. That canon is "a means of giving effect to congressional intent, not of subverting it." *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). Petitioner identifies no reason to think that Congress would have viewed the possibility of a handful of outlier cases raising Excessive Fines Clause issues as a suffi-

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[13] See *Candelaria-Silva*, 166 F.3d at 44; see also, *e.g.*, *United States* v. *Wolford*, 656 Fed. Appx. 59, 67 (6th Cir.), cert. denied, 137 S. Ct. 522 (2016); *United States* v. *Bonventre*, 646 Fed. Appx. 73, 92 (2d Cir. 2016), cert. denied, No. 16-6800 (Jan. 9, 2017); *United States* v. *Jiau*, 624 Fed. Appx. 771, 774 (2d Cir. 2015), cert. denied, 136 S. Ct. 2457 (2016); *United States* v. *Annabi*, 560 Fed. Appx. 69, 74 & n.7 (2d Cir. 2014); *United States* v. *Lyons*, 740 F.3d 702, 732-733 (1st Cir.), cert. denied, 134 S. Ct. 2743 (2014).

cient reason to depart from traditional principles of conspiracy liability—particularly in the context of a broad forfeiture provision that Congress directed "shall be liberally construed to effectuate its remedial purposes." 21 U.S.C. 853(*o*); see *Monsanto*, 491 U.S. at 607 ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied, or broader words to define the scope of what was to be forfeited.").

3. Finally, petitioner contends (Br. 45-47) that the application of traditional principles of conspiracy liability would violate the Sixth Amendment by mandating pretrial freezes of conspirators' untainted assets under Section 853(e), or by allowing the government to use the third-party-transfer provision in Section 853(c) to recover untainted funds paid to an attorney following a conviction. That argument rests on petitioner's mistaken assumption that joint-and-several liability subjects untainted property that a conspirator might use to satisfy a money judgment to Sections 853(c) and (e). Those provisions reach only tainted property—in this context, the traceable proceeds of the offense. See pp. 35-36, *supra*. The application of joint-and-several liability thus imposes no additional obstacle to a defendant's use of untainted funds to hire an attorney.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 21 U.S.C. 853 provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter

or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order

outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) ORDER TO REPATRIATE AND DEPOSIT.—

(A) IN GENERAL.—Pursuant to its authority to enter a pretrial restraining order under this section,

the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) FAILURE TO COMPLY.—Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United

States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

***(l)* Jurisdiction to enter orders**

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of deposi-

tions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition

with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(*o*) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant,

up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of title 18.

2. Federal Rule of Criminal Procedure 32.2 provides:

Criminal Forfeiture

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture.

(1) Forfeiture Phase of the Trial.

(A) Forfeiture Determinations. As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) Evidence and Hearing. The court's determination may be based on evidence already in the record, including any written plea agreement,

and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

(2) Preliminary Order.

(A) Contents of a Specific Order. If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) Timing. Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) General Order. If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) **Seizing Property.** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) **Sentence and Judgment.**

(A) **When Final.** At sentencing—or at any time before sentencing if the defendant consents —the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) **Notice and Inclusion in the Judgment.** The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) **Time to Appeal.** The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4(b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(5) Jury Determination.

(A) **Retaining the Jury.** In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) **Special Verdict Forms.** If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.

(6) Notice of the Forfeiture Order.

(A) **Publishing and Sending Notice.** If the court orders the forfeiture of specific property,

the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) Content of the Notice. The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) Means of Publication, Exceptions to Publication Requirement. Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) Means of Sending the Notice. The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)–(v) of the Federal Rules of Civil Procedure.

(7) Interlocutory Sale. At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.

(1) In General. If, as prescribed by statute, a third party files a petition asserting an interest

in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) **Entering a Final Order.** When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the

final order on the ground that the third party had an interest in the property.

(3) Multiple Petitions. If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

(4) Ancillary Proceeding Not Part of Sentencing. An ancillary proceeding is not part of sentencing.

(d) Stay Pending Appeal. If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) Subsequently Located Property; Substitute Property.

(1) In General. On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) *Procedure.* If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) *Jury Trial Limited.* There is no right to a jury trial under Rule 32.2(e).

RECORD AND BRIEFS

No. 16-142

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IN THE

Supreme Court of the United States

TERRY M. HONEYCUTT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTRODUCTION

Section 853(a)(1) limits forfeiture to property derived from "proceeds the person obtained." 21 U.S.C. §853(a)(1). This text rejects joint-and-several liability. Petitioner did not "obtain" $269,751.98; his brother did.

In response, the government barely argues that §853's text enacts joint-and-several liability. Instead, the government stakes its case on "longstanding background principles" that purportedly ordain joint-and-several liability—in particular, the conspiracy-law rule that each co-conspirator "'becomes responsible for the acts of his co-conspirators.'" Gov't Br. 12, 14-15 (quoting *Smith v. United States*, 133 S. Ct. 714, 719 (2013)). The government asks this Court to read these background principles into §853 because they at least are "consistent with [its] text and structure." Gov't Br. 13.

Thus, under the government's framing of the case, the government must show two things. First, its alleged "background principles" must apply here, such that—absent anything textual to the contrary—they would dictate joint-and-several liability for forfeitures. Second, these principles must in fact be "consistent with Section 853's text and structure."

On both counts, the government fails. This brief addresses these issues in reverse order—first showing that §853's text and structure are inconsistent with the "background principles" the government claims exist, then demonstrating that these background principles are inapplicable.

ARGUMENT

I. SECTION 853'S TEXT AND STRUCTURE REJECT JOINT-AND-SEVERAL LIABILITY.

A. The Government's Textual Argument Fails.

Section 853(a)(1) limits forfeiture to property derived from proceeds "the person obtained." Yet the government cannot claim Petitioner actually "obtained" $269,751.98 from the Brainerd Army Store. Below, the government admitted Petitioner "did not have a controlling interest in the store" and did not "benefit personally from the illegal sales." Pet. App. 60a.

The government offers only one half-hearted textual argument for why §853(a)(1)'s text enacts joint-and-several forfeitures. It claims Petitioner "obtained ... indirectly" the entire $269,751.98, analogizing to property going to "a lawful partnership." Gov't Br. 24-25.

The difference, however, is *actual* ownership. Partners own partnership shares, and thereby indirectly obtain property the partnership receives: They are entitled to a "share of the partnership distributions" from that property, and when the partnership dissolves, they are entitled to the proceeds "in proportion to their respective ... share[s]." Uniform Partnership Act §§203, 401(a), 806(b) (1997). Hence, lawful partners have what Petitioner lacks: They "benefit personally," if indirectly, from property the partnership receives. Pet. App. 60a.

B. Section 853's Structure Is Inconsistent With The Government's Supposed "Background Principles."

The government's position thus boils down to the proposition that even though Petitioner did not actually obtain any proceeds, he should be *deemed* to have obtained them. The government relies on the supposed conspiracy-law rule that each co-conspirator "'becomes responsible for the acts of his co-conspirators,'" like "member[s] of a lawful partnership." Gov't Br. 14-15 (quoting *Smith*, 133 S. Ct. at 719). This Court, the government says, should "presume[]" that "Congress ... incorporate[d]" those background principles into §853 "absent some indication to the contrary." Gov't Br. 42.

But there is an "indication to the contrary." The government's "background principles" yield absurd results under the remainder of §853. That shows Congress did not intend to incorporate them into §853.

Sections 853(a)(2) and (a)(3). As Petitioner's brief showed, joint-and-several liability makes no sense under §853(a)(2), which requires forfeiture of instrumentalities of crime, or §853(a)(3), which requires forfeiture of the defendant's interest in a criminal enterprise. That means joint-and-several liability cannot apply to §853(a)(1), either. Pet. Br. 13-15.

The government agrees that joint-and-several liability does not work under §853(a)(2) and (a)(3). It thus resorts to a *deus ex machina*: joint-and-several liability applies only to §853(a)(1), but not §853(a)(2) or (a)(3). Its explanation: "Unlike Section 853(a)(1), those provisions are tied to *ownership* of specified property or

interests—not to the *act* of obtaining proceeds." Gov't Br. 37.

This distinction has no basis, either in §853(a)'s text or the government's background principles. Section 853(a) lists three types of "property" subject to forfeiture. If §853(a)(2) and (a)(3) can be characterized as tied to "ownership" of the "property" defined in those subsections—thus foreclosing joint-and-several liability—then §853(a)(1) is equally tied to "ownership" of the property defined in that subsection, foreclosing joint-and-several liability for the identical reason.

Conversely, if §853 indeed carried forward a rule that each conspirator "becomes responsible for the acts of his co-conspirators," Gov't Br. 14-15 (quotation marks omitted), that rule would apply to all of §853(a)'s subsections. Under the government's "background principles," if *any* co-conspirator has "used, or intended to be used" a car to commit a crime, each conspirator is responsible for having done so and accrues forfeiture liability. 21 U.S.C. §853(a)(2). And as with "member[s] of a lawful partnership," that liability would be enforceable against any co-conspirator—as an "'obligation of the partnership'" for which all "'are liable jointly and severally.'" Gov't Br. 14-15, 20-21 (quoting Uniform Partnership Act §306(a)).

The Court need not take Petitioner's word for it. While the government asserts that courts "have not extended [joint-and-several] liability to Sections 853(a)(2) and (3)," *id.* at 37, that is untrue. Just last year, the Third Circuit "impos[ed] joint and several liability" under §853(a)(2). *United States v. Miller*, 645 F. App'x 211, 226 (3d Cir.), *cert. denied*, 137 S. Ct. 323 (2016).

Circuit precedent, the court explained, established joint-and-several liability under §853(a)(1), and the "language in §853(a)(2)" is "identical." *Id.* at 227. Indeed, the government urged the Third Circuit to reach this result because it was impossible to "meaningfully distinguish" the two. Br. for United States at 111, *United States v. Miller*, *supra*, 2015 WL 1778521.

Juxtaposed with §853(a)(3), the government's position is especially nonsensical. That subsection, as applied to members of drug conspiracies, serves a similar purpose as §853(a)(1). It requires forfeiture of the defendant's "interest in" the criminal enterprise. 21 U.S.C. §853(a)(3). Yet rather than requiring forfeiture of the entire enterprise, or its value—what joint-and-several liability would dictate—Congress made each conspirator liable only for "his interest." *Id.* The government's position requires believing that, after Congress expressly rejected joint-and-several liability in this conspiracy-specific clause, it silently enacted such liability in §853(a)(1)'s general provision.

There is no principled basis for distinguishing §853(a)(1) from §853(a)(2) and (3). And now that the government concedes that joint-and-several liability is incompatible with these provisions, it cannot be true that "background principles" dictate joint-and-several liability *only* as to §853(a)(1).

Sections 853(c), (e), and (p). Petitioner's opening brief explained that §853 makes sense only if the property that was "obtained" under §853(a)(1) is *tainted* property. Yet the property in the hands of co-conspirators is *untainted* property. If a co-conspirator's untainted property was forfeitable property under

§853(a)(1), it would also be subject to asset freezes and §853's other remedial provisions, yielding a cascade of absurdities. Pet. Br. 16-23.

The government's response is a surprise: It agrees that §853(a)(1) is limited to "traceable proceeds," and that if such "tainted property is available, the government must forfeit that property" and cannot use joint-and-several liability. Gov't Br. 32, 36. To save its desired outcome, the government announces a new position: If tainted assets are *unavailable*, the government can "obtain the forfeiture of substitute property" under §853(p) or a "forfeiture money judgment." Gov't Br. 33. And this, the government says, opens the door for it to obtain "substitute" forfeitures from any co-conspirator. Gov't Br. 33-34.

This theory is wrong, as explained below, but what's striking is its novelty. No court has ever adopted this theory, and as far as Petitioner can tell, the government has never argued it. Rather, the "courts that have applied joint-and-several liability for decades," Gov't Br. 35, have done so because they concluded—at the government's urging—that "*§853(a)(1)* imposes joint and several liability." *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999) (emphasis added); *see* Pet. App. 26a (citing cases). The same goes for the government's Brief in Opposition, which argued that "*Section 853(a)(1)'s* forfeiture obligation ... 'includes all property'" obtained by "'those who acted in concert with'" the defendant. BIO 11 (emphasis added).

This is not just a new *justification*. It is new *rule*. The government now claims that, as a prerequisite for joint-and-several liability, it must prove that the tainted

property is unavailable under §853(p)'s criteria. No court, including the Sixth Circuit below, has ever adopted this rule. Indeed, if the Sixth Circuit had applied this rule, the government would have lost this case. The government did not attempt to prove the "tainted property" Petitioner's brother received was unavailable under §853(p)'s criteria; the record merely showed that the government negotiated a plea agreement in which Petitioner's brother would pay only $200,000 of the $269,751.98 owed. Pet. App. 39a; *see* Final Order of Forfeiture at 2, *United States v. Tony Honeycutt*, No. 12-CR-144 (E.D. Tenn. Dec. 3, 2013), Dkt. 81.[1]

There is another discrepancy between the government's new theory and its lower-court positions. The new theory depends on the claim that, if property is forfeitable only under §853(p) and not §853(a), the government cannot attach it before trial. Gov't Br. 36. That is how the government tries to avoid absurdities under §853's asset freeze provision. *Id.* But the government's position in lower courts is that forfeitable property under §853(p) *is* subject to pretrial restraint. Several courts have rejected this argument, but the Fourth Circuit has accepted it. *See In re Billman*, 915

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[1] The government cites several cases in which courts imposing joint-and-several liability on co-conspirators have required forfeiture of untainted assets. U.S. Br. 33-34. This is obvious. If the co-conspirators had the tainted assets themselves, joint-and-several liability would be irrelevant. But those courts have not endorsed the government's new view that unavailability of the tainted assets is a *prerequisite* for co-conspirators' forfeiture liability.

F.2d 916, 921 (4th Cir. 1990). And in a recent Fourth Circuit brief, the government urged the court to adhere to *Billman*'s holding that "a defendant's untainted or substitute property may be restrained pretrial." Br. for the United States, *United States v. Chamberlain* at 10, No. 16-4313, 2016 WL 4698154 (4th Cir. Sept. 6, 2016). The government has not indicated any change of position in that pending appeal.

The government's position is not just new, but also wrong. It contradicts the statutory text, the statutory purpose, and the very background principles on which the government relies.

First, the government is wrong on the text. Its key claim is that Petitioner must forfeit "substitute property" even though he never obtained forfeitable property under §853(a). Gov't Br. 33, 36. But as Petitioner has explained, §853(p) authorizes forfeiture of substitute property when the defendant *once had* property forfeitable under §853(a). Pet. Br. 21-22. The government ignores this argument altogether. To recap: §853(p) applies only if the government shows that, "as a result of an[] act or omission *of the defendant*," one of five enumerated misfortunes has befallen "property described in subsection (a)"—*i.e.*, property the defendant "obtained." Each of these enumerated misfortunes presupposes that the defendant dissipated property that he obtained. None of §853(p)'s criteria applies where the defendant never received tainted property, but merely foresaw a co-conspirator would do so. Remarkably, the government does not even try to

show that any of those criteria is satisfied here.[2] And to the extent the government's theory is that it can obtain forfeiture of untainted money *without* satisfying §853(p)'s requirements, based on some "unavailability" criterion identified nowhere in §853, this simply illustrates how far the government wanders from the statutory text.

Second, the government's position contradicts the purpose of §853(p), which is to ensure that a defendant cannot benefit by dissipating forfeitable assets. Under the government's rule, if a kingpin obtains proceeds, only he can be liable for forfeiture. But if he hides those proceeds, the result is joint-and-several liability for co-conspirators—which will allow him to keep every dollar that is forfeited from someone else, resulting in the very

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[2] Perhaps the government's unstated theory is that *Pinkerton* principles apply to §853(p)—so that while the statute says the property must be unavailable due to "an[] act or omission of the defendant," *Pinkerton* extends the section to reach acts or omissions by co-conspirators. But for two reasons, that theory fails. First, if *Pinkerton* principles apply to §853(p), they *also* apply to §853(a)(1)—reintroducing all the absurdities the government strains to avoid. Second, *Pinkerton* principles attribute only co-conspirators' acts committed "in furtherance of the conspiracy." *Pinkerton v. United States*, 328 U.S. 640, 647 (1946). One conspirator's dissipation of assets is chargeable to others only if it furthers the conspiracy. This adds *another* new element to the government's theory, which the government did not attempt to prove here and is absent from the cases on the government's side of the split. Indeed, dissipation of assets often will not further the conspiracy—as, for example, if one conspirator goes to Las Vegas and gambles away the proceeds.

benefit from dissipation that §853(p) was designed to prevent.

Third, the government's position contradicts the government's arguments for creating joint-and-several liability in the first place. Ordinary *Pinkerton* principles treat all co-conspirators the same. Every co-conspirator is just as guilty of narcotics trafficking as the person who sold the drugs. Gov't Br. 15-16, 20-21. Faithfully applied, those principles would dictate treating all co-conspirators the same—when one co-conspirator "obtained" something, all co-conspirators would be deemed to have obtained it, and face the same forfeiture consequences.

The government's new rule, however, does *not* treat co-conspirators the same. Rather, per the government, §853 creates two grades of forfeiture defendants. First, there are regular forfeiture defendants who actually received tainted assets. If a conspirator obtains tainted assets, for example, he (and only he) can be liable under §853(a)(1) and compelled to forfeit the assets. Critically, his act of obtaining the assets does not trigger *any* forfeiture consequences for his co-conspirators. Further, his assets (and his alone) are subject to pretrial attachment. 21 U.S.C. §853(e). And the payments he makes to lawyers (no one else's) may be undone. 21 U.S.C. §853(c); *see United States v. Monsanto*, 491 U.S. 600, 614, 616 (1989). Only if the conspirator takes the additional step of thwarting this regular forfeiture may the government may seek a second, lower-grade type of forfeiture. In these forfeitures, the government can pursue co-conspirators, but only for substitute property under §853(p), and it cannot obtain pre-trial restraints or

void subsequent transfers to third parties. Gov't Br. 35-36. This two-tiered system contradicts *Pinkerton*'s premise that every co-conspirator steps into each other's shoes.

C. Neither Rule 32.2 Nor Lower-Court Case Law Warrants Ruling in the Government's Favor.

Recognizing the weakness of its statutory argument, the government suggests that Rule 32.2 might independently authorize a "forfeiture money judgment" that imposes joint-and-several liability. Gov't Br. 32 & n.10. Not so. Rule 32.2 provides procedures for forfeitures *already* authorized by statute. The rule itself says so: In the "Forfeiture Phase," the court "determine[s] what property is subject to forfeiture *under the applicable statute*." *Id.* R. 32.2(b)(1) (emphasis added); *see also id.* R. 32.2(a). The Rules Enabling Act says so too: It provides that the rules, including the Federal Rules of Criminal Procedure, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Instead, "forfeiture money judgments" under Rule 32.2 play a more prosaic role: For example, if a defendant is liable to forfeit substitute property under §853(p), but "has no assets at the time of sentencing," a money judgment reaches "property acquired by the defendant after." *United States v. Smith*, 656 F.3d 821, 827 (8th Cir. 2011).

Equally unavailing is the government's claim that the "overwhelming majority of the courts of appeals" have endorsed joint-and-several liability. Gov't Br. 10. The split favors the government, but many of those decisions are barely reasoned. The two decisions

containing the most detailed reasoning—*Cano-Flores* and *Solomon*—favor Petitioner. Pet. Br. 11-12, 14. Moreover, the government is not even defending the rule adopted in the decisions it invokes. It now says that, before imposing joint-and-several liability, it must show that "specific tainted assets are no longer available," Gov't Br. 33—a new element in a 30-year-old statute. This case now reaches the Court on a blank slate.

II. BACKGROUND PRINCIPLES DO NOT SUPPORT JOINT-AND-SEVERAL LIABILITY FOR FORFEITURES IN CRIMINAL SENTENCES.

Joint-and-several liability fits §853 so badly because it is *not* a "background principle[] against which Congress legislate[s]," Gov't Br. 20 (quotation marks omitted), in this realm. Instead, §853 sits at the intersection of two domains—forfeiture, and sentencing—where background principles *reject* joint-and-several liability. The government's supposed background principles are a barely concealed attempt to create common-law criminal liability, which this Court has rejected for 200 years—by first importing, then rewriting, inapplicable rules from such far-flung areas as *Pinkerton*, venue law, and evidence.

A. The Applicable Background Principles Reject Joint-And-Several Liability.

The government exhausts its pen recapitulating "background principles of conspiracy." Gov't Br. 20; *see id.* at 13-30, 41-42. But it largely ignores the background principles of *forfeiture*—the doctrine §853 actually invokes—including how they apply to co-conspirators.

It is no mystery why. As the government concedes, "joint-and-several liability ... is inconsistent with the tradition of ... forfeiture[]." Gov't Br. 34. Correct: As Petitioner explained, §853 descends from *in rem* forfeitures, which touched only the person who actually *possessed* property, not any co-conspirators. Pet. Br. 27-28. The government makes much of the fact that §853 enacted an "*in personam* criminal forfeiture," which it describes as a "departure from that tradition." Gov't Br. 34. It is true that §853 incorporates elements of traditional "in personam forfeiture," under which a felon forfeited his property to the Crown. Pet. Br. 27 n.6. But this does not help the government, because under such criminal forfeitures, only the *defendant*'s property escheated to the Crown; there is no record of any co-conspirator ever being held jointly liable. *Id.*

The legislative history confirms that *forfeiture*'s "background principles" apply. Modern statutes "focus[ed] on improving the procedures applicable in forfeiture cases," and did not intend any "significant expansion of the scope of property subject to forfeiture." S. Rep. No. 98-225, at 192 (1983). To the contrary, Congress intended §853 to reach "[t]he same type of property ... now subject to civil forfeiture." *Id.* at 211. These affirmations contradict the government's claim that Congress, *sub silentio*, upended traditional forfeiture by creating joint-and-several liability for the first time.

No apologies are needed for this legislative history. The Court has cautioned against "allowing ambiguous legislative history to muddy clear statutory language." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). But

here, the government does not rely on "clear statutory language." Its position proceeds from atextual assumptions about Congress' supposed intent to incorporate "background principles." If, as the government maintains, atextual assumptions about congressional intent are relevant to the interpretation of §853, then the first place to look should be legislative history. Yet the legislative history makes clear that Congress was incorporating different background principles that favor Petitioner. Tellingly, the government ignores this legislative history altogether.

Section 853(a)(1) differs from *in rem* forfeiture in another way: It is part of a criminal sentence. But in this respect, too, background principles favor Petitioner. Sentences are individual, not joint-and-several. Each defendant serves his own sentence and pays his own fine. Pet. Br. 51. That is why Walter and Daniel Pinkerton were liable for each other's substantive crimes, but received and discharged individual prison terms and fines. *Pinkerton v. United States*, 328 U.S. 640, 641 (1946). Joint-and-several forfeiture liability contradicts these background principles by requiring Petitioner to discharge part of the legal obligation his brother incurred. Pet. Br. 51-53.

The government insists that *Pinkerton* principles "also appl[y] at sentencing," Gov't Br. 18, but it glosses over *how*. All the government's examples are not materially different from *Pinkerton* itself: Courts attribute "act[s]" of one co-conspirator to others to determine, say, "the quantity of drugs that establishes" the sentencing range. Gov't Br. 18. But the government ignores what happens next: Co-conspirators receive

individual sentences and discharge them individually. That is inconsistent with the government's rule, which treats co-conspirators as interchangeable and imposes joint-and-several liability.

B. The Government is Seeking Common-Law Criminal Liability.

The government's position has a deeper problem. It claims to be following caselaw permitting the application of "background principles" in criminal cases. It is not. Instead, the government asks this Court to ratify the common-law-style expansion of criminal liability—repurposing doctrines from other areas of the law, based on nothing in §853's text. Centuries of this Court's law rejects that maneuver.

The government's citations betray that what it seeks is unprecedented. To support the claim that it may invoke "background principles" to create joint-and-several liability, the government cites cases interpreting criminal statutes based on "'well-established principles' of conspiracy liability." Gov't Br. 41 (quoting *Salinas v. United States*, 522 U.S. 52, 63-66 (1997), and citing *United States v. Shabani*, 513 U.S. 10, 15-17 (1994)). But in those cases, the modern statutes *ratified* pre-existing principles: *Salinas* and *Shabani* interpreted the word "conspire," and the Court held that "conspire" should mean what it has always meant. *Pinkerton* was similar—the Court ratified a pre-existing common-law principle of conspiracy liability. Pet. Br. 49.

The government asks for something different here. Section 853(a) refers to "forfeiture" as part of a "sentence." Yet unlike in *Salinas* and *Shabani*, the

government does not look to the background principles those words bring with them: It *rejects* traditional forfeiture principles and traditional sentencing principles. Nor can the government claim that §853 simply ratified a joint-and-several forfeiture regime that existed before its enactment. Instead, the government's position is that Congress silently created a *new* forfeiture regime, based on strained analogy to the "principle that ... conspirators are responsible for each other's acts" that applies to the "hearsay rule," the "forfeiture-by-wrongdoing doctrine," "venue provisions," and so on. Gov't Br. 17-18.

What gives away that the government is not just implementing "background principles," Gov't Br. 20, is that it must first *rewrite* its background principles in order to jerry-rig them onto forfeiture. Two examples are given above. First, the government must apply its principles selectively—only to §853(a)(1), and not §853(a)(2) and (a)(3). *Supra* at 3-5. Second, the government treats conspirators who actually "obtained" proceeds differently from co-conspirators, when its background principles would treat all co-conspirators the same. *Supra* at 10-11. Indeed, the government's entire *enterprise*—to impose joint-and-several liability, with all the anomalies that follow, Pet. Br. 29-36—seeks to create something that has never existed. The government insists that joint-and-several liability is necessary to avoid excess government recoveries. Gov't Br. 27. But this problem, which has never arisen in the centuries-long history of either conspiracy law or forfeiture law, exists only because the liability the government seeks to impose is *new*. Rather than

rewriting §853(a)(1) to enact such liability, then taking out the blue pencil again to fix the resulting problems, the Court should follow the statute as written. *Cf. Kloeckner v. Solis*, 133 S. Ct. 596, 607 (2012) ("If we reject the Government's odd view ... no absurdity arises in the first place ....").

The government is not doing statutory interpretation. Nor is it genuinely applying pre-existing background principles. Rather, the government is applying concepts from other contexts—in modified form—to forfeiture. That is classic common-law reasoning. *See Funk v. United States*, 290 U.S. 371, 384 (1933). In the criminal realm, however, "federal courts lack[] the power to supplement ... statutory crimes through the use of the common law." *Lewis v. United States*, 523 U.S. 155, 160 (1998). Rather, only Congress can "make an act a crime [and] affix a punishment to it." *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Congress has never enacted joint-and-several forfeiture liability. That should end the matter.

III. JOINT-AND-SEVERAL LIABILITY CONTRADICTS FORFEITURE'S PURPOSES.

There is a reason conspiracy's "background principles" have never been applied to forfeiture. They do not work. If the government is going to extend conspiracy's "background principles" to a new domain, it should at least explain why that extension makes sense. Yet, the government barely responds to Petitioner's arguments that joint-and-several liability contradicts forfeiture's purposes.

As Petitioner has shown, forfeiture serves the remedial purposes of preventing criminals from "profit[ing] from their illegal acts." *United States v. Ursery*, 518 U.S. 267, 290-91 (1996). Joint-and-several liability undermines this purpose by allowing bosses who received tainted property (like Petitioner's brother) to keep it while directing liability to underlings (like Petitioner) who did not. Pet. Br. 29-31.

The government complains that Petitioner "identifies no case where such a result has occurred," and suggests that it is implausible. Gov't Br. 40. But this result occurs in virtually *every* case, including here. Petitioner's brother reaped $269,751.98, but forfeited only $200,000, and apparently kept the rest. Petitioner must forfeit that amount instead, and his brother "profit[s] from [his] illegal acts." *Ursery*, 518 U.S. at 290-91.

The government also warns that, without joint-and-several liability, the question whether "a particular co-conspirator 'physically handled the money'" will receive "'conclusive weight.'" Gov't Br. 40 (citation omitted). This argument depends on the premise that if a co-conspirator so much as touches money—for example, the henchman who moves bags of money from safehouse to car—he "obtains" that money and is forever liable to forfeit that amount, even from untainted substitute assets. This premise is doubtful, and the government cites no case so holding.[3] And if the government's

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[3] The government's cited case, *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995), does not so hold. Rather, it includes a dictum

premise were true, that result would merely flow from Congress's choice to tie forfeiture to property. Similar oddities were well known in forfeiture's history—for example, that a ship's owner might have to forfeit the vessel simply because its captain chose, unknown to the owner, to carry contraband. *See Austin v. United States*, 509 U.S. 602, 617 (1993). By contrast, the government's position creates anomalies unknown to forfeiture's long history. At minimum, the government's supposed anomaly is no justification for the result it urges, which requires a low-level conspirator who "physically handled" proceeds to forfeit *not only* those proceeds, but *additional* proceeds that he never touched, but merely accrued foreseeably to someone else.

The government fares even worse on forfeiture's punitive purposes. Petitioner's opening brief showed that joint-and-several forfeiture liability accords with no rational theory of punishment. Unlike traditional forfeiture, punishment is not pegged to receipt of property. Instead, joint-and-several forfeitures are indistinguishable from fines. Yet while *actual* fines are discretionary and subject to carefully reticulated procedures that calibrate crime and punishment, joint-and-several forfeitures are mandatory and based solely on the amount someone else receives. Pet. Br. 32-33. The government's position makes particular nonsense of the Alternative Minimum Fines Act, which provides discretionary authority to impose fines based on "any person['s] ... pecuniary gain." 18 U.S.C. §3571(d). That

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"imagining" a scenario in which the defendant "had been caught with the [property] just before delivering it." *Id.* at 21.

discretionary authority is a farce if §853 compels mandatory forfeiture of other people's gains. Pet. Br. 33-34.

The government's response? Silence. It says *nothing* about forfeiture's punitive purposes in its brief. The Court should decline the government's invitation to import "background principles" into this new context when it cannot explain why that result coheres with *either* of forfeiture's purposes.

Joint-and-several liability so badly fits forfeiture because—as Petitioner's opening brief showed—it derives from doctrines, like tort law, that focus on a different purpose: compensating victims. By contrast, forfeiture's purpose is not to compensate victims, but to strip criminals of the proceeds of crime. Pet. Br. 36-40.

Feebly, the government insists that joint-and-several liability "is not limited to ... tort" but "also applies to "debts of a partnership" or liability for breach of fiduciary duty. Gov't Br. 29. But these examples prove Petitioner's point. In both, the payments are compensation for harm—to the partnership's creditors, or the victims of the fiduciary's breach.[4]

Likewise, the government has no adequate answer to *Paroline v. United States*, 134 S. Ct. 1710 (2014), which held that the absence of a "right to contribution" for restitution—likewise absent here—pointed away from

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[4] The government insists that it sometimes uses forfeitures to compensate victims. But compensation is entirely "in [the] discretion" of the Attorney General, *United States v. Bailey*, 630 F. App'x 902, 903 (11th Cir. 2015), and in many drug cases, like this one, there are no ascertainable victims to compensate.

joint-and-several liability. *Id.* at 1725. The government asserts that the "traditional rule" was that "intentional wrongdoers held jointly and severally liable ... *did not* enjoy a right of contribution." Gov't Br. 29. But to begin, the modern rule is the opposite: "[C]ontribution is not precluded ... by the fact that [the party] is liable for an intentional tort." *Restatement (Third) of Torts: Apportionment of Liability* § 23, cmt. l (2000). Perhaps that is why the same argument in *Paroline* did not move the Court—or indeed, the government, whose brief rejected the argument the government now makes.[5]

More important, the government misstates the traditional rule, which denied contribution to a "tortfeasor who has intentionally *caused the harm*." *Restatement (Second) of Torts* § 886A(3) (1979) (emphasis added). Intentionally joining a conspiracy differs from intentionally causing particular harm. Indeed, courts applying the government's "traditional rule," Gov't Br. 29, have held that when someone is merely "vicariously liable ... for ... intentional misconduct" by another—what the government seeks to inflict via *Pinkerton*—the bar on contribution "does not operate." *Paloian v. Ridgestone Bank (In re Canopy Fin., Inc.)*, No. 09-44943, 2014 WL 3725724, at *2 (N.D. Ill. July 28, 2014) (quotation marks omitted) (citing cases from Florida, Michigan, and Minnesota and noting "the

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[5] *See* Reply Br. for United States at 17, *Paroline*, 2013 WL 6699432 (noting Amy's argument that joint-and-several liability "would nonetheless be appropriate" despite absence of contribution "because the common law did not allow intentional tortfeasors to pursue contribution," but rejecting it because the results would be "not ... proportionate").

court cannot find any decision that disagrees"); *see also Restatement (Second) of Torts* §886A, cmt. a.

Federal restitution statutes further refute the government's position. As Petitioner explained, 18 U.S.C. §3664(h) authorizes a form of joint-and-several liability where that doctrine's justifications apply—the compensatory remedy of restitution. It states that the Court "may make" each defendant liable for the full loss, or "may proportion liability" among defendants. 18 U.S.C. §3664(h). It would be strange indeed to inflict a harsher form of joint-and-several liability, without statutory authorization, when the doctrine's justifications are absent. Pet. Br. 39-40.

In response, the government observes that before this statute's 1996 enactment, courts had "impose[d] joint and several ... liability on multiple defendants." Gov't Br. 27 (quoting *United States v. Hunter*, 52 F.3d 489, 494 (3d Cir. 1995)). This, the government suggests, supports imposing nonstatutory joint-and-several forfeiture liability here. *See id.* The pre-1996 statutes, however, *invited* joint-and-several liability: They pegged restitution liability to "damages or loss caused *by the offense*"—which, naturally read, encompasses harm caused by other defendants liable for the offense. 18 U.S.C. §3651 (1982); *see* 18 U.S.C. §§3663, 3664 (1994) (similar). Then, these statutes instructed courts to consider "the amount of the loss sustained by [the] victim" and the defendant's "financial resources" and "needs," 18 U.S.C. §3664(e)—not how much harm was caused by one defendant, rather than another. These decisions provide no support for joint-and-several forfeiture liability, where §853(a)(1) bases the forfeiture

on the amount "the person [convicted] obtained," and where joint-and-several liability's justifications are absent.

IV. THE CANONS SUPPORT PETITIONER.

The government also has no answer to the canons of construction.

Lenity. The government insists that "background legal principles" provide the requisite clarity to overcome the rule of lenity. Gov't Br. 41. That may have been true in the government's cited cases, *Salinas* and *Shabani*—which used background conspiracy principles to flesh out the word "conspire." *Salinas*, 522 U.S. at 66; *Shabani*, 513 U.S. at 17. But there are no such on-point background principles here: §853 concerns "forfeiture" and "sentences," which have no tradition of joint-and-several liability. If lenity has any force, it precludes expanding criminal liability via attenuated analogy to different principles applicable to venue law, the Confrontation Clause, and the like. At a minimum, if §853 is ambiguous as to *which* background principles apply, lenity requires applying the background principles which reject joint-and-several liability.

Constitutional avoidance. Petitioner also showed that the government's position is structured to yield violations of the Excessive Fines Clause. In every drug ring or criminal enterprise, that position compels every low-level courier to "forfeit" the organization's entire gross take, provided the amount was foreseeable—yielding results like *Cano-Flores*'s $15 billion judgment. *United States v. Cano-Flores*, 796 F.3d 83, 94 (D.C. Cir. 2015); *see* Pet. Br. 43-45.

In response, the government brushes off *Cano-Flores* as an "outlier." But although *Cano-Flores* appears to be the high-water mark, the government frequently seeks forfeitures via joint-and-several liability vastly exceeding the amount the defendant actually obtained. *See, e.g.*, *United States v. Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999) (noting affirmance of forfeiture order requiring "minor participants" in a conspiracy "to forfeit ... up to approximately $140 million"); *United States v. Van Brocklin*, 115 F.3d 587, 602 (8th Cir. 1997) (finding "$1.3 million forfeiture order" "grossly disproportionate" for "secondary figure" who received "no direct share of the proceeds").

Moreover, the government "misconceives ... the role played by ... avoidance in statutory interpretation." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). The government is careful not to dispute that, on its view, §853 compels a *Cano-Flores*-type forfeiture in every large-scale conspiracy. The government simply observes that in other large drug conspiracy cases, it apparently has refrained from taking its interpretation to the logical conclusion. But constitutional avoidance is a tool for identifying Congress's intent, *id.*, and its operation does not depend on the government's subsequent enforcement strategies.

Sixth Amendment. Petitioner also showed that the government's position inevitably yields Sixth Amendment violations: If co-conspirators are jointly and severally liable under §853(a)(1), their untainted assets are subject to pretrial attachment under §853(e), even when needed to pay an attorney. Pet. Br. 45-47. This Court has held that result violates the Sixth

Amendment. *Luis v. United States*, 136 S. Ct. 1083, 1091 (2016) (plurality opinion).

The government apparently agrees that result is untenable, and to avoid it, constructs the theory discussed above: that §853(a)(1) does *not* enact joint-and-several liability, and only §853(p)'s substitute property provision reaches co-conspirators' untainted property. But as already shown, that theory contradicts §853's text and structure, every lower court decision on the issue, the government's longheld litigating positions, and the government theories elsewhere in its merits brief. *Supra* at 5-11.

V. THE GOVERNMENT'S ALLEGED PRACTICAL PROBLEMS DO NOT JUSTIFY REWRITING §853.

The government warns that, unless the Court appends joint-and-several liability to §853, enforcing forfeitures will be too hard. Per the government, Petitioner's position would require it to "'prove exactly which defendant received how much,'" and thus defendants could avoid forfeiture by "mask[ing] the allocation of the proceeds." Gov't Br. 38.

But the government buries in a footnote its acknowledgement of the provision that addresses this problem: §853(d), which creates a "rebuttable presumption" that property is forfeitable if it was acquired during "the period of the violation" or "a reasonable time after," and "there was no likely source" besides the crime. 21 U.S.C. §853(d). The government says §853(d) is insufficient because the defendants may have "entirely dissipated or concealed the proceeds," or

there may be "a lack of accurate records." Gov't Br. 38-39 n.11. But if the proceeds are "entirely" hidden and there are no accurate records, the government could not obtain forfeiture with or without joint-or-several liability. In any event, any difficulty in proving that a defendant "obtained" funds in a particular case does not justify a judicial repeal of the "obtained" element.

If a "lack of accurate records" is thwarting forfeitures, the government can seek amendment from Congress. The answer is not to rewrite §853 as prophylaxis, and impose joint-and-several liability on Petitioner where there *are* accurate records that definitively show Petitioner never received a cent of the proceeds the government seeks to forfeit.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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TERRY M. HONEYCUTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL's many thousands of members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and accords it full representation in the ABA House of Delegates.[1]

NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide its unique viewpoint in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This is such a case. Joint and several forfeiture liability for drug trafficking imposes draconian judgments out of proportion to an offender's culpability. This case provides the Court with an opportunity to restore the forfeiture statute to the scope Congress intended.

SUMMARY OF ARGUMENT

Criminal forfeiture is a form of punishment traditionally tied to a defendant's actual proceeds from the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

criminal offense. By forcing the defendant to disgorge his ill-gotten gains from a crime, forfeiture serves "to ensure that crime does not pay." *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014).

Joint and several forfeiture liability is different: It requires the defendant to pay the government an amount measured not by his unlawful gains but by the full amount of illicit proceeds that *anyone* received from the crime (or at least those reasonably foreseeable to the defendant). When the crime is a large drug-trafficking conspiracy, a defendant's joint and several forfeiture liability under 21 U.S.C. § 853 will often vastly exceed any personal benefit he may have derived from it. The Court should reject such an anomalous form of punishment for three reasons.

First, joint and several forfeiture liability defies basic principles of proportionality in criminal sentencing, principles Congress has repeatedly endorsed (by, for example, creating the Sentencing Commission). Whereas prison sentences for drug conspirators are calibrated to reflect the defendant's actual role in the conspiracy, joint and several forfeiture may saddle defendants with identical liability notwithstanding significant differences in culpability. The Court should not attribute to Congress a result so plainly at odds with its broader policy judgments in the field of criminal sentencing.

Second, by requiring defendants to pay amounts not limited to their ill-gotten gains, joint and several forfeiture liability amounts to a de facto criminal fine. But joint and several forfeiture judgments are not subject to the constraints Congress has sensibly imposed on de jure fines, such as a requirement that sentencing courts consider a defendant's personal financial circum-

stances and a bar against the seizure of property exempt from levy under certain provisions of the Internal Revenue Code. De facto fines through joint and several forfeiture may also cause a defendant's total financial punishment to exceed the statutory maximums for de jure fines. The Court should not construe § 853 to enable the government to circumvent these limitations simply by applying the "forfeiture" label to what is effectively a fine.

Finally, the Court should construe § 853 to avoid the serious constitutional questions that joint and several forfeiture liability would create. Criminal forfeiture judgments are subject to scrutiny under the Excessive Fines Clause of the Eighth Amendment, and joint and several forfeiture is particularly likely to violate that provision, either categorically or on a case-by-case basis. By allowing forfeiture of lawfully obtained property, joint and several forfeiture liability may also deprive a defendant of funds needed to hire counsel of choice, in violation of the Sixth Amendment. And joint and several forfeiture liability may violate the Due Process Clause by permanently depriving a defendant of all present and future property—a penalty tantamount to a "forfeiture of estate," which the Constitution explicitly prohibits even for the far more severe offense of treason. U.S. Const. art. III, § 3.

ARGUMENT

I. JOINT AND SEVERAL FORFEITURE LIABILITY VIOLATES BASIC PRINCIPLES OF SENTENCING

Congress has made clear that one of the paramount goals of criminal sentencing is proportionality, that is, the imposition of "appropriately different sentences for criminal conduct of different severity." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1342 (2016)

(quotation marks omitted). In personam forfeiture judgments are part of a criminal defendant's sentence, *Libretti* v. *United States*, 516 U.S. 29, 38-39 (1995), and therefore should be imposed in a manner that "achieve[s] the 'proportionality' goal of treating ... major drug traffickers and low-level dealers ... differently," *Dorsey* v. *United States*, 132 S. Ct. 2321, 2328 (2012). Joint and several liability under § 853 frustrates that objective, by treating every member of a drug conspiracy as if he were a kingpin who reaped all of the proceeds from the conspiracy—no matter how far removed from any profits he was.

Most people involved in drug distribution are not kingpins, or even close. Extrapolating from a sample of 15 percent of all reported drug cases in 2009, the U.S. Sentencing Commission determined that 27.8 percent of the defendants functioned as couriers or "mules" responsible for transporting drugs, and that another 17.2 percent functioned as street dealers. U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 165, 166-167, D-61 (2011).[2] Just 3.1 percent qualified as organizers or leaders, with an even smaller percentage as managers or supervisors. *Id.* at D-61.

Joint and several forfeiture liability is a ruinously disproportionate penalty when imposed on low-level participants in a drug-trafficking enterprise. Such defendants—having profited very little, if at all, from the conspiracy in which they participated—generally lack funds with which to satisfy a large forfeiture judgment.

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[2] *Available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

Consider Stacey Wolford. A young high-school dropout, Stacey lived in a remote corner of Kentucky with Brent Evans, a convicted felon who was ten years her senior and the father of her child. *See* Def.'s Sentencing Mem. 1-2, Dkt. 267, *United States* v. *Wolford*, No. 13-cr-22 (E.D. Ky. Jan. 28, 2015); *see also* Sentencing Tr. 22-23, Dkt. 322, *Wolford* (Feb. 9, 2015). Brent was controlling, jealous, and possessive. Sentencing Mem. 2. On occasion, he directed Stacey to accompany him and others on trips to Texas that he organized to acquire prescription narcotics. *Id.*; Sentencing Tr. 9-12.

Nonetheless, when Stacey was convicted of participation in a drug conspiracy orchestrated by Brent, the Sixth Circuit upheld the district court's ruling holding her jointly and severally liable for $269,700, the full "proceeds of the conspiracy that were reasonably foreseeable to ... her." *United States* v. *Wolford*, 656 F. App'x 59, 66-67 (6th Cir. 2016) (quotation marks omitted); *see also* Sentencing Tr. 65, Dkt. 326, *United States* v. *Evans*, No. 13-cr-22 (E.D. Ky. Feb. 25, 2015). The court of appeals determined that Stacey had "benefitted from the fruits of the conspiracy" because she was Brent's "live-in girlfriend and mother of his child." *Wolford*, 656 F. App'x at 67 (quotation marks omitted). It pointed to no evidence, however, that Stacey had actually obtained any of the drug trafficking proceeds, other than a minivan Brent had purchased for her. *Id.* The court observed that Brent had used drug proceeds to renovate the home he shared with Stacey, *id.*, but did not suggest she had any ownership interest in that home. In short, the court required Stacey to disgorge thousands of dollars worth of assets she never obtained.

Assessing a financial penalty that ignores the severity of a defendant's conduct and the defendant's degree of profit is discordant with how courts otherwise

punish co-conspirators. Under the Sentencing Guidelines, courts adjust prison sentences based on the defendant's relative culpability. For example, § 3B1.1(c) contemplates a two-point offense-level enhancement for an "organizer, leader, manager or supervisor," while § 3B1.2(a) authorizes up to a four-point reduction for defendants who play a minimal role. The district court invoked these two provisions when sentencing Stacey and Brent to prison terms of radically differing lengths—51 months for Stacey, 360 months for Brent. *Wolford* Sentencing Tr. 18-19, 29; *Evans* Sentencing Tr. 67-74, 104. Yet construing § 853 to allow joint and several liability would tell courts to ignore those kinds of disparities in imposing forfeiture. There is no indication that Congress desired the incongruous result that the disparate significance of different defendants' roles in an offense would be reflected in their prison terms but not in other elements of their sentences. Nor does any sound penological rationale support such an approach.

Although the incongruity produced by joint and several forfeiture liability could in theory be ameliorated by a low-level defendant's invocation of a right of contribution, in practice such a right is unavailable. A contribution right may arise "through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or ... through the power of federal courts to fashion a federal common law of contribution." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981). But neither § 853 nor any other federal law creates a right of contribution in this context. And while an implied right of contribution may be "discerned by looking to the legislative history and other factors," such as "the identity of the class for whose benefit the statute was enacted" and "the overall

legislative scheme," *id.* at 639, the legislative history of § 853 contains no indication that Congress meant that provision to permit contribution for forfeiture judgments. Rather, as the Ninth Circuit observed of another forfeiture provision in determining whether contribution was permitted, § 853 was "decidedly not enacted for the benefit of conspirators." *United States* v. *Guillen-Cervantes*, 748 F.3d 870, 873 (9th Cir. 2014) (addressing 18 U.S.C. § 982(a)(6)(A)). That leaves the common law—but this Court has held that contribution among wrongdoers alone "does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." *Texas Indus.*, 451 U.S. at 642.[3]

In short, the imposition of joint and several forfeiture liability under § 853 creates a real risk of punishing defendants out of proportion to the proceeds they obtained or the degree of their participation in a conspiracy. Requiring defendants to disgorge property they never obtained—and thus imposing on them judgments they have little hope of satisfying—without accounting for their role in the offense is out of step with Congress's goal of achieving proportional punishment.

II. Joint And Several Forfeiture Liability Imposes A De Facto Criminal Fine In Contravention Of Congressional Intent

There is ordinarily a sharp distinction between criminal forfeiture judgments and fines: Forfeiture is disgorgement of a defendant's ill-gotten gains, whereas

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[3] Congress did provide in § 853(n) for the rights of third parties claiming an interest in property ordered forfeited. That provision makes all the more glaring the absence of any provision addressing contribution among co-defendants.

a fine is an additional discretionary penalty to be paid from his untainted assets. But where a court orders a defendant to forfeit funds he has never obtained—as here, and as will often be the case with joint and several liability under § 853—there is no meaningful difference between a forfeiture and a fine. Collapsing the distinction between these penalties contravenes congressional intent in multiple ways, indicating that § 853 is not meant to encompass joint and several forfeiture liability.

A. Congress Enacted § 853 To Deprive Defendants Of Their Proceeds From Crime

In personam criminal forfeiture is a form of punishment relatively new to American law. "Although *in personam* criminal forfeitures were well established in England at the time of the founding, they were rejected altogether in the laws of this country until" several decades ago, when Congress first enacted forfeiture provisions "to combat organized crime and major drug trafficking." *United States* v. *Bajakajian*, 524 U.S. 321, 332 & n.7 (1998).

Unlike a fine, which is a discretionary penalty that the defendant must pay to the government using funds he earned legally, Casella, *Asset Forfeiture Law in the United States* § 20-5 (2d ed. 2013), "[c]riminal forfeitures are imposed upon conviction to confiscate assets used in or gained from certain serious crimes," *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014). They are meant to negate any economic incentive for crime—"to ensure," in other words, "that crime does not pay." *Id.*

Congress understood the distinctions between fines and forfeitures when it enacted § 853, and it made clear that it envisioned § 853 as authorizing only the latter

type of punishment—a punishment specifically tied to the defendant's proceeds from the charged offense. The legislative history referred to § 853 as a "mechanism for achieving the forfeiture of *a defendant's proceeds* from his drug trafficking or of other property he has used in the offense." S. Rep. No. 98-225, at 210 (1983) (emphasis added). And Congress distinguished the forfeiture provision from the "traditional criminal sanctions of fine and imprisonment," indicating that the punishments should operate independently. *Id.* at 191. Consistent with the broader history and purpose of criminal forfeiture provisions, Congress thus meant for § 853 to negate the economic incentive for drug trafficking by ensuring that convicted traffickers could not retain their unlawful proceeds.

Reading § 853 to permit joint and several liability would cause it to diverge from the historical origins and purposes of criminal forfeiture provisions—the understanding of forfeiture that informed Congress's enactment of the provision. It would require defendants not just to disgorge their ill-gotten gains but also to pay the government an amount bearing no relationship to their financial gains (if any) from participation in a drug conspiracy.

B. Joint And Several Forfeiture Liability Disregards The Limits Congress Imposed On Fines For Drug Offenders

Divorcing criminal forfeiture from its purpose of requiring defendants to disgorge illicit gains, and thus making it a de facto fine, creates two significant anomalies with existing laws governing criminal fines for drug crimes.

First, joint and several forfeiture liability effectively allows the government to seek (and courts to impose)

fines that exceed the statutory maximum. Ordinarily, drug-trafficking fines are limited to the greater of (1) twice the pecuniary gain resulting from the offense of conviction, 18 U.S.C. § 3571(d), and (2) statutorily prescribed amounts that depend on the drug quantity involved, 21 U.S.C. § 841(b). Interpreting § 853 to permit joint and several liability would effectively allow the government to extract an additional fine measured by the proceeds of the offense, simply by characterizing the amount as a "forfeiture." In cases where the maximum statutory fine is twice the proceeds of a conspiracy, joint and several forfeiture liability in effect allows a fine up to *three* times the proceeds.

Second, de facto fines imposed through joint and several liability would not be subject to important constraints Congress has placed on de jure fines. Specifically, Congress has directed courts to weigh a defendant's personal characteristics and financial circumstances when setting fines for drug offenses. 18 U.S.C. § 3572(a) (requiring courts to consider the factors articulated in 18 U.S.C. § 3553(a); the defendant's income, earning capacity, and financial resources; and the burden that any fine will impose on the defendant and his dependents); *see also* Pet. Br. 32. Section 853 contains no such requirements; indeed, this Court has emphasized that courts cannot adjust a forfeiture award imposed under § 853. *United States* v. *Monsanto*, 491 U.S. 600, 606-607 (1989). Congress has also prohibited the government from satisfying a fine by seizing assets of a defendant that are exempt from levy under certain provisions of the Internal Revenue Code. 18 U.S.C. § 3613(a)(1). Exempt assets include, for example, unemployment benefits and worker's compensation. 26 U.S.C. § 6334(a)(4), (7). Neither these provisions nor any analogous provisions, however, similarly

shield a defendant's assets from being seized to satisfy an unpaid forfeiture judgment.

Reading § 853 to require an inflexible forfeiture in excess of a defendant's ill-gotten gains thus would effectively create a new punishment inconsistent with Congress's choices to set maximum fines for drug crimes, to calibrate fines for drug offenses on the basis of a defendant's personal circumstances, and to limit the government's collection powers.

III. The Court Should Construe § 853 To Avoid Serious Constitutional Problems

"[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider [whether] ... one of them would raise a multitude of constitutional problems." *Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005). If so, the other construction should prevail, "whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 381. That canon is implicated here because if § 853 were construed to allow joint and several forfeiture liability, three serious constitutional concerns would arise.

First, joint and several forfeiture judgments may violate the Eighth Amendment's Excessive Fines Clause, either categorically or on a case-by-case basis. This Court has held that forfeiture of criminal proceeds that a defendant owns can constitute an "excessive" fine. *Bajakajian*, 524 U.S. at 327-334. Indeed, the Court has said that the forfeiture of both assets used to further a RICO enterprise and proceeds from the enterprise is "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'" *Alexander* v. *United States*, 509 U.S. 544, 548, 558 (1993).

By expanding the scope of forfeiture to require disgorgement of property a defendant never obtained, joint and several liability presents new and challenging questions about Eighth Amendment proportionality. Defendants could persuasively argue that an order to disgorge property never actually obtained is invariably a violation of the Eighth Amendment, since it effectively requires the defendant to do the impossible. At the very least, joint and several liability would increase the magnitude of forfeiture awards in numerous drug conspiracy cases and would thus sharply increase the number of case-specific proportionality challenges that courts must address.

Second, joint and several forfeiture liability under § 853 could violate the Sixth Amendment right to counsel. Just last Term, a majority of Justices agreed that pretrial restraint of property that is "untainted" by the alleged crime—*i.e.*, property that is not the "proceeds obtained from the crime," "contraband," or a "tool[]" used to commit the crime—violates the Sixth Amendment at least insofar as that property is "needed to retain counsel of choice." *Luis* v. *United States*, 136 S. Ct. 1083, 1088, 1090, 1091 (2016) (plurality opinion) (quotation marks omitted); *see also id.* at 1096-1097 (Thomas, J., concurring in the judgment). Joint and several forfeiture liability would implicate the same Sixth Amendment concerns addressed in *Luis* by creating another pathway for the government to deprive defendants of untainted funds often needed to retain counsel of choice. *See* 21 U.S.C. § 853(e)(1)(A) (upon filing of indictment, court may restrain property "for which criminal forfeiture may be ordered" under § 853(a)).

Finally, joint and several forfeiture judgments may violate the Due Process Clause by permanently

depriving a defendant of all present and future property—a penalty tantamount to imposing a "forfeiture of estate," which the Constitution explicitly prohibits for even the far more severe offense of treason.

Forfeiture of estate—the seizure of all "right, title and interest [in property], wheresoever situate[d]," *United States* v. *Thevis*, 474 F. Supp. 134, 140 (N.D. Ga. 1979)—was historically imposed on felons in England. That penalty was deeply disfavored in the United States at the time of the Founding. *United States* v. *Sandini*, 816 F.2d 869, 873 (3d Cir. 1987). Accordingly, the Constitution provides that not even "attainder of treason shall work ... forfeiture except during the life of the person attainted," U.S. Const. art. III, § 3, and the First Congress eliminated "forfeiture of estate" as a penalty for any felonies, Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 112, 117. While Congress compelled forfeiture of Confederate sympathizers' property through the 1862 Confiscation Act, even that penalty was limited to the lives of the offenders. *Bigelow* v. *Forrest*, 76 U.S. (9 Wall.) 339, 351 (1870).

After Congress revived criminal forfeiture in 1970, by enacting RICO's forfeiture provision, 18 U.S.C. § 1963, courts entertained claims that the law violated the Constitution by imposing a punishment prohibited even for treason. Courts upheld the new punishment, however, reasoning that the forfeiture was "limited to that property utilized in the commission of" a crime, and therefore not the equivalent of a forfeiture of estate. *Thevis*, 474 F. Supp. at 141; *see United States* v. *Grande*, 620 F.2d 1026, 1037-1039 (4th Cir. 1980). The one court to have analyzed whether forfeiture under § 853 would constitute a forfeiture of estate similarly concluded that it would not, because § 853 "does not provide that the drug offender must forfeit *all* his or

her property wherever it is and for whatever it is used." *United States* v. *Anderson*, 637 F. Supp. 632, 634 (N.D. Cal. 1986), *rev'd on other grounds sub nom. United States* v. *Littlefield*, 821 F.2d 1365 (9th Cir. 1987).

Joint and several forfeiture liability, however, gives rise to a much more significant risk of working such a complete forfeiture of estate, by depriving a defendant of any and all of his property—present and future—"wherever it is and for whatever it is used," *Anderson*, 637 F. Supp. at 634. Where a low-level conspirator is held liable for proceeds retained entirely by co-conspirators, in an amount many times his net worth or earnings capacity, he may effectively be required to turn over to the government all the property he owns or may ever own. As noted, no statute appears to stop the government from attempting to collect on a § 853 judgment by seizing a defendant's interest in his unemployment benefits, worker's compensation, or any other property exempt from levy under the Internal Revenue Code—even though it would not be able to reach that property if the same penalty were called a fine. This scenario raises serious due process concerns "because of the irrationality of a ruling that forfeiture of estate cannot be imposed for treason but can be imposed for a pattern of lesser crimes." *Grande*, 620 F.2d at1038.

To avoid these thorny constitutional issues, the Court should construe § 853 not to permit the imposition of joint and several forfeiture liability.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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